(1)

SHDKT PROCEEDINGS AND ORDERS DATE: [01/17/96]

CASE NBR: [95106016] CFH STATUS: [DECIDED]
SHORT TITLE: [Tuggle, Lem D.]
VERSUS [Netherland, Warden] DATE DOCKETED: [091895]
*** CAPITAL CASE *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Sep 18 1995	G	Application (A95-270) for a stay of execution pending the disposition of a petition for a writ of certiorari, submitted to The Chief Justice.
2	Sep 18 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Sep 19 1995	X	Brief of respondent in opposition filed.
5	Sep 20 1995	X	Reply brief of petitioner Lem Tuggle filed.
6	Sep 20 1995		Application (A95-270) referred to the Court by the Chief Justice.
7	Sep 20 1995	X	Reply brief of respondent Netherland filed.
8	Sep 21 1995		Application (A95-270) granted by the Court.
9	Sep 21 1995		DISTRIBUTED. September 26, 1995 (Page 107)
11	Oct 2 1995		REDISTRIBUTED. October 6, 1995 (Page 24)
13	Oct 10 1995		REDISTRIBUTED. October 13, 1995 (Page 13)
15	Oct 23 1995		REDISTRIBUTED. October 27, 1995 (Page 21)

Last page of docket

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*** CAPITAL CASE *** PAGE: [02]

	DATE	NOTE	PROCEEDINGS & ORDERS
17	Oct 30 1995		Petition GRANTED. Judgment VACATED and case REMANDED Concurring opinion by Justice Scalia. Opinion per curiam. **********
18	Nov 29 1995		JUDGMENT ISSUED.

1PP

No. 95-6016

(2)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

LEM DAVIS TUGGLE, JR.,

Petitioner,

vs.

J. D. NETHERLAND, WARDEN

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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143 pp

CAPITAL CASE: Execution Date Scheduled September 21, 1995

QUESTIONS PRESENTED

A state psychologist interviewed Petitioner, a capital defendant, as the basis for an opinion that Petitioner posed a danger in the future. The interview was in violation of a trial court order and defense counsel were not notified. Once counsel became aware of the interview and prospective prosecution testimony, they sought to retain a defense expert to rebut the state's psychological testimony and assist in the sentencing defense. The trial court forbade Petitioner to engage an expert and allowed the state psychologist to testify in his capital sentencing that he posed a future danger. The jury found the "future dangerousness" aggravating circumstance and exercised its discretion, based on all evidence before it, to sentence the Petitioner to death.

The District Court concluded, inter alia, that (a) the state's use against Petitioner of psychological testimony based on an uncounseled interview violated Estelle v. Smith, 451 U.S. 454 (1981), and (b) the trial court's refusal to allow the defendant to retain his own defense expert violated Ake v. Oklahoma, 470 U.S. 68 (1985). The Court of Appeals accepted that the sentencing was unconstitutional, but affirmed the death sentence by invalidating the jury's "future dangerousness" aggravating circumstance and ruling that the sentencing jury's additional finding of the "vileness" aggravating circumstance sufficiently supported the death sentence. This case accordingly presents the following questions:

1. When the state introduces expert testimony on psychiatric issues at a capital sentencing proceeding in violation of Estelle v. Smith, 451 U.S. 454 (1981), and when the indigent defendant has no opportunity to prepare a defense to such testimony because he was denied the assistance of an independent expert in violation of Ake v. Oklahoma, 470 U.S. 68 (1985), does Zant v. Stephens, 462 U.S. 862 (1983) allow the resulting unconstitutional death sentence to stand because there remains, ostensibly, one valid aggravating circumstance?

2. Was the "vileness" aggravating circumstance valid, notwithstanding that the jury and appellate court acted without any sufficient limiting construction of the same circumstance that this Court found facially unconstitutional in Godfrey v. Georgia, 446 U.S. 420 (1980)?

3. Under the rule of Turner v. Murray, 476 U.S. 28 (1986) and Mu'Min v.Virginia, 500 U.S. 415 (1991), may a trial court constitutionally refuse to conduct individualized voir dire of jurors or allow defense challenges for cause in a capital case when (a) members of the jury, including the foreman, had been publicly criticized by the prosecutor for rendering a lenient verdict in a murder trial that ended a few days before Petitioner's trial began; (b) jurors had been contacted by the press before trial and asked to justify their lenient verdict in the previous case; and (c) four jurors were exposed before trial to critically inaccurate and prejudicial press accounts of Petitioner's prior record?

4. When the prosecution's expert could not conclude whether penetration had occurred, could any "rational trier of fact" conclude that the Petitioner was guilty of rape, beyond a reasonable doubt?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

LEM DAVIS TUGGLE, JR.,

Petitioner,

vs.

J. D. NETHERLAND, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Lem Davis Tuggle, Jr. (Tuggle), a Virginia inmate under sentence of death, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit reversing a writ of habeas corpus granted him by the United States District Court for the Western District of Virginia.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in Tuggle v. Thompson, 57 F.3d 1356 (4th Cir. 1995) and appears in Appendix A to this Petition. The opinion of the District Court for the Western District of Virginia is reported as Tuggle v. Thompson, 854 F. Supp. 1229 (W.D. Va. 1994) and appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on June 29, 1995. A timely Petition for Rehearing was filed on July 13, 1995. The Court of Appeals' denial of the Petition for Rehearing was issued on July 25, 1995 and is set forth in Appendix C. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments V, VI, VIII and XIV to the United States Constitution are set forth in Appendix D.

STATEMENT OF THE CASE

Lem Davis Tuggle, Jr. was convicted of the capital offense of murder during the commission of rape and sentenced to die by the Circuit Court of Smyth County, Virginia in 1984. His case was so controversial that, even today, a framed copy of his death warrant adorns the wall of the Smyth County Circuit Court Record Room, the only document from any case in the county's history that is

displayed in that fashion. All courts that have considered this case have concluded that Tuggle was sentenced in violation of the United States Constitution. Indeed, the Virginia Attorney General conceded in 1985 that Tuggle was entitled to be re-sentenced. But, no re-sentencing has occurred and the Virginia Attorney General now presses for Petitioner's execution.

A) Tuggle's Trial

The offense for which Tuggle was convicted occurred on May 29, 1983. The victim died of a single gunshot wound to the chest. App. 123.[1] Semen was found in the victim's rectum, but there was no evidence of any injury there. App. 133, 143. No semen was found in the victim's vagina, but the examiner performing the autopsy testified at the preliminary hearing that the condition of the body suggested "either manipulation or penetration" of the vagina. App. 20. When pressed whether the condition was just as likely caused by manipulation as by penetration, the examiner testified "without the finding of seminal fluid, spermatozoa in the vaginal vault, I would say it would be just as likely. There is no way to determine." Id.

Upon motion of Tuggle's counsel, the trial court ordered state mental health professionals to examine Tuggle, explicitly confining the order to an examination of (1) Tuggle's sanity at the time of

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[1] Record citations refer to the Joint Appendix that the parties filed in the United States Court of Appeals for the Fourth Circuit. These references demonstrate that the federal issues pursued in this Petition were properly raised in the state trial court. Pursuant to Supreme Court Rule 14.1(g)(i), the specified record references are included as Appendix E to this Petition.

the offense and (2) his competence to stand trial. App. 30. The Virginia statute governing such examinations established that nothing said during the course of such an evaluation could be used against Tuggle at trial "as evidence or as a basis for such evidence" unless he elected to assert a defense based on diminished mental status. Va. Code § 19.2-169.

Tuggle was transferred to a state hospital where Doctor Arthur Centor interviewed him pursuant to the trial court's order and informed the court that, in his opinion, Tuggle was sane and could assist in his defense. App. 39-40. Centor also informed the court that he, of his own accord, had examined Tuggle to develop an opinion of the defendant's "future dangerousness." Centor did so even though the court order referring Tuggle for examination had not requested any such opinion, and defense counsel was not informed that such an evaluation would be made. App. 39-40, 191.

Upon learning about Dr. Centor's expanded examination of their client, Tuggle's counsel moved for evaluation by an independent psychiatrist to help them prepare a defense for Tuggle. App. 41-42. Trial counsel offered to pay for such an investigation from their own funds because the court had denied a previous request for such expert assistance. App. 28-29, 38. The trial court denied the motion. App. 57-62.

Several weeks before trial, Tuggle's counsel moved for a change of venue due to inaccurate and prejudicial publicity that the case had received in the months leading up to trial. App. 43. Some of the publicity wrongly stated that Tuggle had previously

been convicted of rape. App. 45-48. Another article reported that Tuggle was suspected of the rape of a young girl in a nearby county for which he was never charged. App. 46. These inaccuracies were critical because, without the rape charge, Tuggle would not have been charged with capital murder.[2] Three articles reported that capital murder in Virginia carried a mandatory death sentence. App. 46, 52, 116. The trial court denied the motion to change venue, conditioned on the ability to select an unbiased jury following voir dire. App. 74-76.

On the night before trial, Tuggle's counsel learned that some members of the venire from which the Tuggle jury was to be selected had been contacted by a member of the Sheriff's Department and by Terry Hawthorne, a reporter for the Smyth County News, apparently concerning their performance as jurors in a murder trial that had occurred a few days earlier. App. 78-79. In that trial, the jurors convicted the defendant of a crime less than the charged offense of first degree murder and the local prosecutor publicly criticized the jurors, calling their verdict a "travesty of justice." App. 79, 117-18.

On the morning of trial, Tuggle's counsel informed the trial court that the Sheriff and press had contacted members of the jury venire about the sufficiency of their verdict in the prior case. Id. Given the nature of the prosecutor's comments about the jurors, and the possibility of embarrassment and intimidation,

[2] The capital charge in Tuggle's case was murder during the commission of rape. At the time, murder during the commission of sodomy was not a capital crime in Virginia.

defense counsel asked for the opportunity to voir dire the jury about such contacts or to summon those who had contacted members of the venire for questioning. App. 78-79. The trial court denied both requests. App. 79.

When the first twenty members of Tuggle's venire were called for voir dire, eight panel members immediately indicated in the presence of the other venire members that they had formed an opinion as to Tuggle's guilt. App. 82-84.[3] Once these jurors were excused, the venire still contained five members who had been contacted before trial either by a member of the Sheriff's Department or by a representative of the local media. App. 90-91. Ten members of the venire indicated that they had read articles about the Tuggle case, including the article that referred to a prior homicide and that contained the false reports that Tuggle had a previous rape conviction and was suspected in another rape case. App. 94-107. Despite counsel's request, the trial court refused to allow any individualized voir dire of these jurors and would not allow any questions about the content of what they had read. App. 80, 95.

After general questioning of the jury panel was complete, the trial court declared the panel qualified and told Tuggle's counsel to commence their peremptory strikes. App. 113-14. Tuggle's counsel asked for the opportunity to challenge jurors for cause outside their hearing, but the trial court refused to hear any

[3] After excusing the eight jurors from the panel, the trial court once again refused to change the venue of the trial. App. 113.

challenges for cause. Id. The jury ultimately seated in Tuggle's case included at least five individuals who had read articles concerning the case (four read the article that contained the false rape information) and three individuals who were subject to pre-trial contacts. App. 89-114, 119.[4]

On the afternoon of the first day of trial, Tuggle's counsel received a copy of the Smyth County News of that day, confirming that some of the jurors who were sitting on Tuggle's jury had been contacted by the paper and asked to explain why they arrived at the assertedly lenient verdict in the murder case tried a few days before. App. 146. One of the jurors sitting on the Tuggle case, Robert Brown, was quoted as saying that the defendant should have received a maximum sentence rather than that actually imposed. App. 118. Mr. Brown was later selected foreman of the Tuggle jury. App. 245. Tuggle's counsel moved for a mistrial because of the article. The trial judge refused even to read the article and summarily denied the motion. App. 146, 149-50.

During the trial, the Commonwealth introduced expert testimony from its pathologist on the rape evidence. App. 120-44. The pathologist explained that there was no internal vaginal injury.

[4] This is one of the few areas of factual dispute in the case. The Commonwealth contends that only one of the jurors, the foreman Robert Brown, had previously been contacted by the media. The trial transcript is admittedly murky on this point, but it appears that five members of the Tuggle venire (Catron, Anderson, Dunford, Eastridge and Brown) sat on the previous jury and all five had been contacted either by law enforcement or media representatives. App. 90. Catron and Anderson were struck, leaving the remaining three jurors to sit in Tuggle's trial. App. 119.

App. 139, 143. The prosecution elicited testimony that the condition of the body suggested penetration by "something, a penis, a finger, an object, something." App. 124. But, on cross-examination, the medical examiner admitted that the body's condition was consistent with either "manipulation or penetration" of the vagina. App. 143. Because the court had denied Tuggle's motion for an expert pathologist, the defense could put on no affirmative evidence challenging the rape charge. The jury convicted Tuggle of murder during the commission of rape. App. 245.

During the sentencing phase of Tuggle's trial, the prosecution called Dr. Arthur Centor to testify about Tuggle's future dangerousness. App. 185-87, 192-93, 199-205. Tuggle objected to the testimony on the ground that the trial court's commitment order had not authorized Centor to examine the defendant's future dangerousness, and defense counsel were given no notice that such an examination would take place. App. 188-191. The trial court overruled the objection and Centor testified that Tuggle showed "a high probability of future dangerousness." App. 202. Because defense counsel's repeated requests to retain an independent psychiatric expert, either at the state's or their own expense, had been denied, they could not offer evidence to counter the professional testimony of Dr. Centor.

In instructing the jury on the "vileness" aggravating circumstance, the trial court told the jury it could impose the death penalty if it found that Tuggle's conduct in committing the

crime "was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." App. 242. Tuggle's counsel sought specific instructions defining the terms "aggravated battery" and "depravity of mind" but the trial court refused to allow any definition. App. 244.

In closing argument at the sentencing phase of the trial, the Smyth County prosecutor relied heavily on Dr. Centor's testimony that Tuggle would endanger others in the future. App. 229, 233-34. The jury recommended a sentence of death, finding both the "vileness" and "future dangerousness" aggravating circumstances provided by Virginia law. App. 245; Va. Code 19.2-264.4(C).

B) Tuggle's Direct Appeal

The Virginia Supreme Court affirmed Tuggle's conviction and sentence on appeal, relying on Dr. Centor's testimony as one of the grounds for the affirmance. Tuggle v. Commonwealth, 228 Va. 493, 517, 323 S.E.2d 539, 554 (1984)(Tuggle I). The court rejected Tuggle's claim that he was entitled to psychiatric assistance in his capital sentencing and found that he had waived his Sixth Amendment rights when he spoke with Dr. Centor at Central State Hospital. The Court also found that there was sufficient evidence to convict Tuggle of rape and that the "vileness" instruction delivered to his jury was not unconstitutionally vague. With respect to his numerous claims that his right to impartial jury was violated, the court upheld the trial court's refusal to allow individualized voir dire on the effect of the jurors' exposure to

inaccurate press and also affirmed the trial court's refusal to allow any voir dire concerning pre-trial contact of jurors by the Sheriff and local media. The court did note that the trial court's refusal to allow challenges for cause was contrary to law, but found that Tuggle's counsel had not adequately preserved the issue because they did not separately proffer which jurors they would have challenged.

This Court granted Tuggle's certiorari petition, vacated the judgment in his case and remanded the case to the Virginia Supreme Court in light of the decision in Ake v. Oklahoma, 470 U.S. 68 (1985). Tuggle v. Virginia, 471 U.S. 1096 (1985). On remand, the Virginia Attorney General conceded that Tuggle must be re-sentenced because of the Ake error. The Virginia Supreme Court refused to accept the concession. Although it acknowledged the Ake error and struck down the "future danger" aggravating circumstance, it held that the jury's finding of "vileness" was sufficient by itself to affirm the death sentence under Virginia's "non-weighing" capital sentencing structure, citing Zant v. Stephens, 462 U.S. 862 (1983). Without evaluating the effect that the psychiatric testimony and argument might have had on the sentencing jury in its analysis of the "vileness" circumstance and in its discretionary decision to impose the death penalty, the Virginia Supreme Court re-affirmed the sentence. Tuggle v. Commonwealth, 230 Va. 99, 110-11, 334 S.E.2d 838, 845-46 (1985)(Tuggle II), cert denied, Tuggle v. Virginia, 478 U.S. 1010 (1986). In affirming the death sentence, the court did not perform the proportionality and arbitrariness

review required by Virginia statute. Va. Code § 17.2-110.1(C).

C) Tuggle's Habeas Corpus Proceeding

Tuggle filed his petition for state habeas corpus relief in October 1986. The petition was denied in March 1991 and his appeal to the Virginia Supreme Court was unsuccessful.[5] In September 1992, Tuggle filed a federal habeas corpus petition in the United States District Court for the Western District of Virginia. On June 8, 1994, the district court granted his habeas petition on seven independent grounds, finding that the circumstances of Tuggle's trial demonstrated an "extreme willingness to sidestep petitioner's constitutional rights to ensure a conviction." Tuggle v. Thompson, 854 F. Supp. 1229, 1239 (W.D. Va. 1994). The court found that Tuggle's trial was constitutionally improper for the following reasons: 1) the failure of the trial court to appoint Tuggle an independent psychiatric expert to assist in his sentencing defense violated Ake v. Oklahoma; 2) the combination of inaccurate publicity, prosecutorial criticism of jurors, pre-trial contact of jurors by the media and Sheriff's Department, inadequate voir dire and refusal to allow Tuggle to challenge jurors for cause violated his right to trial by an impartial jury; 3) there was insufficient evidence to convict Tuggle of the rape element of his capital charge; 4) the testimony of Dr. Centor at Tuggle's sentencing was improper because it was based on discussion with Tuggle outside the presence of counsel without an effective waiver

[5] Tuggle filed a petition for writ of certiorari in this Court after the completion of his state habeas proceedings, but the petition was denied. Tuggle v. Bair, 503 U.S. 989 (1992).

of his Fifth and Sixth Amendment rights; 5) the "vileness" instruction given to Tuggle's sentencing jury was unconstitutionally vague; 6) the trial court's restrictions on the efforts of Tuggle's counsel rendered them unable to provide effective representation of their client; 7) the Virginia Supreme Court denied Tuggle "meaningful appellate review" when it considered his case on remand from the United States Supreme Court without following its own statutory procedures governing the review of death sentences.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court on all seven grounds and ordered that Tuggle's habeas petition be dismissed. Tuggle v. Thompson, 57 F. 3d. 1356 (4th Cir. 1995).[6] The appellate court did not dispute that Tuggle's sentencing was infected with constitutional error. It excused the Ake v. Oklahoma and Estelle v. Smith violations, however, by invalidating the "future dangerousness" aggravating circumstance and holding that the jury's "vileness" finding was sufficient, in and of itself, to support the death sentence.

[6] The Fourth Circuit Opinion failed to even discuss two of the grounds for relief found by the district court--that Tuggle's trial counsel were rendered ineffective by the restrictions placed on their defense and that the Virginia Supreme Court deprived Tuggle of "meaningful appellate review" in its decision affirming his death sentence in Tuggle II. Given that the Court of Appeals ordered that the petition be dismissed, Tuggle assumes that the District Court's rulings on these grounds were reversed.

REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit's Holding that this Court's Opinion in Zant v. Stephens Cured Admitted Constitutional Error in Tuggle's Capital Sentencing Conflicts with, Other Controlling Decisions of this Court, and Decisions of the Eleventh Circuit and the Virginia Supreme Court.

Certiorari on this question should be granted because the Opinion below conflicts with previous opinions of this Court, a decision of the United States Court of Appeals for the Eleventh Circuit and a recent decision of the Virginia Supreme Court. Sup. Ct. Rule 10(a) and (c).

All courts that have considered this case have now acknowledged that Tuggle's capital sentencing was unconstitutional. The proceeding violated Ake v. Oklahoma, 470 U.S. 68 (1985) because the trial court allowed the state to introduce psychological evidence in support of the "future dangerousness" aggravating circumstance while forbidding Tuggle to retain an expert witness to counter that testimony and support his own defense in mitigation. The district court also found that the proceeding violated Estelle v. Smith, 451 U.S. 454 (1981) because the doctor who provided the state's "future dangerousness" testimony examined Tuggle on the subject without notice to counsel, in violation of a court order limiting his examination to Tuggle's sanity at the time of the offense and his competence to stand trial.[7]

[7] The District Court rejected the Virginia Supreme Court's ruling that Tuggle had waived his constitutional rights in submitting to the interview on "future dangerousness." 854 F.Supp. at 1243. This ruling of the District Court was not challenged by the Court of Appeals.

The Court of Appeals did not contest that these constitutional violations occurred. Instead, it held that the jury's finding that Tuggle's crime was "vile" was sufficient, in itself, to validate his death sentence. The Opinion based this ruling purely on Zant v. Stephens, 462 U.S. 862 (1983).

In Zant, a capital sentencing jury received instructions on three aggravating circumstances, including that the defendant had been previously convicted of a "substantial number of serious assaultive offenses." The state presented no evidence on the controverted circumstance that was not otherwise properly before the jury. Pursuant to Georgia law, which, like Virginia law, makes the finding of one or more aggravating circumstances the sole prerequisite to an entirely discretionary jury sentencing decision, the jury opted for death based on the evidence before it.

On appeal, the Georgia Supreme Court struck down the noted aggravating circumstance as unconstitutionally vague, but upheld the death sentence on the ground that the other two aggravating circumstances allowed the jury to invoke its full sentencing discretion. The Georgia court emphasized that the aggravating circumstance finding affected only the threshold determination of whether the defendant was eligible for the death penalty and that once that threshold was crossed by a single valid aggravator, it was the evidence, and not the number or weighing of aggravating circumstances, that informed the jury's sentencing discretion.

In reviewing the death sentence in Zant, this Court noted that the ability of an appellate court to uphold a death sentence after

eliminating an aggravating circumstance in a "non-weighing" state depends "on the reasons that the aggravating circumstance . . . was found to be invalid." Zant, 462 U.S. at 864. Critical to such an analysis is a determination as to whether the invalid aggravating circumstance affected the overall pool of evidence considered by the jury in making its discretionary sentencing decision. Under the facts present in Zant, the evidence supporting the stricken aggravating factor was "fully admissible at the sentencing phase" for purposes other than establishing that circumstance. Zant, 462 U.S. at 886. The Court accordingly upheld the death sentence because:

> . . . any evidence on which the jury might have relied in this case to find that respondent had previously been convicted of a substantial number of serious assaultive offenses, as he concedes he had been, was properly adduced at the sentencing hearing and was fully subject to explanation by the defendant. . . . This case involves a statutory aggravating circumstance, invalidated by the state Supreme Court on grounds of vagueness, whose terms plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged.

Id. at 887 (emphasis added; citations and footnotes omitted). The Court clearly stated, however, as the State of Georgia conceded, that "if an invalid statutory aggravating circumstance were supported by material evidence not properly before the jury, a different case would be presented." Id. at 887 n.24.*

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* This language from Zant, which is at the heart of that case, was repeatedly pressed on the Court of Appeals in Tuggle's case. The Fourth Circuit's Opinion fails to distinguish or even mention it, even though earlier decisions of that court had recognized the principle. See e.g., J. Briley v. Bass, 750 F.2d 1238, 1245 n. 12 (4th Cir. 1984)(rejecting challenge to Virginia "vileness" aggravating circumstance because of separate "future dangerousness"

The instant petition presents exactly the "different case" that the Zant Court contemplated, namely, a death sentence issued following jury consideration of an evidentiary pool poisoned by "material evidence not properly before the jury," i.e., the psychiatric testimony obtained following Dr. Centor's secret, uncounseled interview with Tuggle. Indeed, this case presents a more serious challenge to the death sentence than that contemplated in Zant because the admitted constitutional errors not only allowed introduction of improper evidence at sentencing, but also prevented Tuggle from rebutting the improper evidence and putting on his own sentencing defense. Thus, the decision below derives no support from Zant, but is instead directly in conflict with that decision. In fact, Zant compels relief here, as the District Court concluded:

> In this case, it cannot be said that the evidence presented to the jury was unaffected by the "future dangerousness" aggravating circumstance stricken by the Virginia Supreme Court. Because the state tried Tuggle on the "future dangerousness" aggravator, the jury did hear psychological testimony that Tuggle posed a serious threat to society. And, because the state committed the constitutional error of not granting Tuggle's request for psychiatric assistance, the jury did not hear testimony from Tuggle to rebut the future dangerousness claim. Thus, unlike Zant, the material presented to the Tuggle sentencing jury was seriously skewed because of the constitutional error.
>
> . . . .
>
> In Tuggle's case, the Ake violation put improper and highly prejudicial material before his sentencing jury. The Commonwealth cites no case in which a court has found that an Ake violation was cured because there were other statutory aggravating circumstances. This fact is explained because an Ake violation cannot be cured by a mere review of the record. The violation, by depriving a defendant of needed assistance, thwarts his very ability to make a record on a critical point or even to rebut the evidence marshalled against him.

854 F. Supp. at 1237-38 (emphasis in original).

This Court reiterated the Zant principle in Johnson v. Mississippi, 486 U.S. 578 (1988). App. 347. In Johnson, a jury sentenced the defendant to death after finding three statutory aggravating circumstances, including that the petitioner previously had been convicted of another felony involving violence. The Supreme Court vacated the death sentence because the previous felony relied upon in establishing the "prior violent felony" aggravating circumstance was an uncounseled conviction, obtained in violation of the constitution. The state attempted to justify affirmation of the death sentence using the same Zant v. Stephens argument made by the Commonwealth here, i.e. that there were other valid aggravating circumstances that would independently support the sentence. The Court unanimously rejected the argument, however, relying directly on Zant and noting that the error "extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Johnson, 486 U.S. at 590.

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finding; court applies Zant only after concluding that "no evidence was introduced on "vileness" separately at the penalty stage of the bifurcated trial; rather, the jury's verdicts on that circumstance were necessarily based upon the evidence of the murders admissible at the guilt stage").

Simply put, if aggravating evidence before the sentencing jury was unconstitutionally admitted and/or inaccurate, the presence of valid aggravating circumstances serves as no cure.

The Court of Appeals distinguished Johnson v. Mississippi simply by noting that "Mississippi uses the weighing system and Virginia does not." 57 F.3d at 1363. This perfunctory reference ignored the fact that the Johnson Court relied heavily on Zant in striking the death sentence, even though Zant was a decision from a non-weighing state like Virginia. This Court's jurisprudence establishes that, whether in a weighing state or non-weighing state, the evidence to be evaluated by a jury in reaching its sentencing decision cannot be tainted by constitutional error. See e.g., Richmond v. Lewis, 113 S.Ct. 528 (1992); Sochor v. Florida, 504 U.S. 577 (1992); Stringer v. Black, 593 U.S. 222 (1992); Clemons v. Mississippi, 494 U.S. 738 (1990). While the difference between weighing and non-weighing sentencing schemes is significant in some instances, neither system allows the casual admission of unconstitutional, admissible and inflammatory sentencing evidence, nor excuses a trial court that deprives a capital defendant of the "basic tools of an adequate defense." Ake v. Oklahoma, 470 U.S. 68, 77 (1985)(citations omitted).

The United States Court of Appeals for the Eleventh Circuit reversed a death sentence from a non-weighing state under strikingly similar conditions in Buttrum v. Black, 908 F.2d 695 (11th Cir. 1990). The state had introduced psychological testimony on "future dangerousness" against the capital defendant and then

deprived the defendant of a meaningful opportunity to present expert assistance to counter the testimony and support her defense. As in this case, the state's "future dangerousness" testimony was developed surreptitiously by a psychologist ordered to investigate only the defendant's competence and sanity. The appellate court adopted a district court opinion which granted habeas relief on the grounds that (1) the state testimony violated Estelle v. Smith, and (2) the failure to allow the defendant the full assistance of an expert to counter that testimony violated Ake v. Oklahoma. Buttrum v. Black, 721 F. Supp. 1268, 1308-14 (N.D. Ga. 1989). Because of these errors, a re-sentencing was ordered even though the sentencing jury found two aggravating circumstances in the case that were not impaired by constitutional errors.

Even the Virginia Supreme Court now recognizes that death sentences cannot stand under these circumstances. In Mickens v. Commonwealth, 249 Va. 423, 457 S.E.2d 9 (April 21, 1995)(Attached as Appendix F), the defendant was charged with capital murder. In a pretrial motion, Mickens contended that he was entitled to inform the jury of his parole ineligibility, but the trial court denied the motion. The jury later convicted Mickens of capital murder based both on the "vileness" and "future dangerousness" aggravating circumstances. The Virginia Supreme Court affirmed his death sentence and Mickens petitioned this Court for a writ of certiorari. The writ was granted and this Court vacated the judgment, remanding it for further consideration in light of Simmons v. South Carolina, 114 S.Ct. 2187 (1994).

Simmons had held that, when future dangerousness is at issue in the sentencing phase of a capital trial, the jury is entitled to be informed of the defendant's parole ineligibility. On remand, the Virginia Supreme Court recognized that the Simmons error affected the "future dangerousness" aggravator in that Mickens should have been allowed to inform the jury of his parole eligibility. Despite the existence of a separate "vileness" finding, and despite the Commonwealth's argument that the "vileness" finding rendered the constitutional error superfluous, the Virginia Supreme Court found that the constitutional error altering the sentencing evidentiary record entitled the petitioner to be re-sentenced.

The decision below is thus in square conflict with the decisions of this Court, the Eleventh Circuit, and the Virginia Supreme Court. No other court has ever held that the Zant rationale can excuse Ake or Estelle error committed during the sentencing phase of a capital trial. Lest Zant be interpreted as a blanket excuse for all manner of constitutional violations in capital sentencing proceedings, the Court should grant certiorari.

2. The Fourth Circuit's Holding that Virginia Courts Properly Affirmed the Petitioner's Death Sentence Under the Sentencing Jury's "Vileness" Finding is in Conflict with Decisions of this Court.

Certiorari should be granted on this question because the Court of Appeals' affirmance of Virginia's "vileness" aggravating circumstance is contrary to this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980) and subsequent cases. Sup. Ct. Rule

10(c). The Virginia statutory circumstance is indistinguishable from others that this Court has struck down and the Virginia Supreme Court has done nothing to sufficiently narrow its application. This claim is particularly important because lower courts have acknowledged that the "future dangerousness" aggravating circumstance in Tuggle's sentencing was invalid and his death sentence now rests solely on the "vileness" circumstance.

The Eighth and Fourteenth Amendments require statutory aggravating factors to meet two standards to justify a death sentence. First, "the aggravating circumstance may not be unconstitutionally vague" -- that is, it must have a "'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" Tuilaepa v. California, 114 S.Ct. 2630, 2635-36 (1994) (citing Godfrey v. Georgia, 446 U.S. 420, 428, (1980), and Arave v. Creech, 113 S.Ct. 1534, 1541 (1993), and quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring)). Second, "the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder." Tuilaepea v. California, 114 S.Ct. at 2635 (citing Arave, 113 S.Ct. at 1542). The Virginia statute fails to meet either prong of this test.

The Virginia statute provides that a person convicted of capital murder may be sentenced to death if his or her conduct is found to be "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.2 (Repl. Vol. 1995).

In Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980), this Court held that a vileness aggravating factor identical to Virginia's was unconstitutionally vague and overbroad on its face.[9] Even the Virginia Supreme Court has conceded that Virginia's "vileness" provision is identical to the Georgia provision at issue in Godfrey. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978).

A statutory aggravating circumstance that is too vague as stated can nevertheless be used if the jury is given a tightly drawn definition instruction, or if the state appellate court reviews the particular finding with a consistent and narrow appellate construction. See e.g., Walton v Arizona, 497 U.S. 639, 653 ("when a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutional on its face."); Maynard v. Cartwright, 486 U.S. 356 (1988). Neither occurred here.

The Virginia Supreme Court, recognizing that "any act of murder arguably involves a 'depravity of the mind' and 'an aggravated battery to the victim," developed a limiting construction of its "vileness" aggravating circumstance that is

[9]In other cases, this Court has held that vague, pejorative adjectives are not constitutionally sufficient absent well-drawn limiting instructions. Sochor v. Florida, 504 U.S. 527 (1992)("heinousness" or "coldness"); Shell v. Mississippi, 498 U.S. 1 (1990) ("especially heinous, atrocious, or cruel"); Maynard v. Cartwright, 486 U.S. 356 (1988) (same).

often given to juries in capital cases. Smith v. Commonwealth, 219 Va. at 478. The construction provides the following definitions for the statutory terms "aggravated battery" and "depravity of mind":

> . . . we construe the words "depravity of mind" as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. Contextually, we construe the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

Id.[10] Here, Tuggle's counsel requested that the terms "aggravated battery" and "depravity of mind" be defined as set forth in Smith, but the trial court refused to give even that minimal instruction. Instead, it simply read the jury the vague statutory language, adding an additional clause as shown:

> That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

Tuggle v. Thompson, 57 F.3d at 1371. Neither the terms "aggravated

[10] This limiting construction was not given as an instruction to Tuggle's sentencing jury or utilized by the Virginia Supreme Court during appellate review. Even if it had been used, the construction would not solve the invalidity of the Virginia "vileness" aggravating circumstance. Rather than creating a specific and well-defined class of murders for which the death penalty is appropriate, these minimal definitions create a single hypothetical murder for which the death penalty may not be imposed and allow the death penalty in all other cases where the theoretical minimum is exceeded. See Shell v. Mississippi, 498 U.S. 1 (1990)(appellate limiting construction still too vague to cure vague aggravating circumstance).

battery" nor "depravity of mind" were defined.

The trial court's reading of the statutory language, with the brief addition, did not cure the unconstitutionality of the "vileness" aggravating circumstance. In Godfrey, this Court recognized that instructing the jury with the essentially identical statutory language was insufficient because "a person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" Id. at 429. Similarly, in Maynard v. Cartwright, 486 U.S. 356 (1988), the Court held that a jury instruction repeating Oklahoma's "especially heinous, atrocious, or cruel" statutory language violated the Eighth and Fourteenth Amendments because the term "especially heinous" provided no guidance to the jury and that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" Id. at 364.

In Shell v. Mississippi, 498 U.S. 1 (1990), the Supreme Court found unconstitutional a limiting instruction that was far more specific and detailed than that given in Tuggle's case to qualify the phrase "aggravated battery." In Shell, the trial court gave a limiting instruction defining Mississippi's "especially heinous, atrocious, or cruel" aggravating factor which stated that the "the word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict high degree of pain with indifference to, or even enjoyment of the suffering of others." Id. at 2. (Marshall, J., concurring). The Supreme Court held that this instruction was "not

constitutionally sufficient." Id. at 1. If the Shell limiting instruction was constitutionally infirm, then the Tuggle court's cryptic "beyond the minimum necessary to accomplish the act of murder" cannot be found to meet the standards of specificity imposed by the Eighth and Fourteen Amendments.

Just as the trial court failed to limit the vague Virginia aggravating circumstance through a jury instruction, the Virginia Supreme Court failed to channel the "vileness" factor in its review on direct appeal.[11] In reviewing Tuggle's death sentence under the vileness predicate, the Virginia Supreme Court failed to even apply the minimal Smith definitions of the term's "depravity of mind" and "aggravated battery", noting that the Smith definitions "are not necessarily the best or the only definitions for these terms." Tuggle, 228 Va. at 516. Instead, the court merely stated that the crime for which Tuggle was convicted was "outrageously vile and involved depravity of the mind." Id. at 517. Without any explanation or detailed analysis, the court also summarily

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[11]The Virginia Supreme Court has never reversed a case in which the imposition of the death penalty relied upon the "vileness" aggravator. See, e.g., Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992), cert. denied, 113 S.Ct. 1880 (1993); Stewart v. Commonwealth, 245 Va. 222, 427 S.E.2d 394, cert. denied, 114 S.Ct. 143 (1993); Davidson v. Commonwealth, 244 Va. 129, 419 S.E.2d 656, cert. denied, 113 S.Ct. 423 (1992); Thomas v. Commonwealth, 244 Va. 1, 419 S.E.2d 606, cert. denied, 113 S.Ct. 421 (1992); Hoke v. Commonwealth, 237 Va. 303, 377 S.E.2d 595, cert. denied, 491 U.S. 910 (1989); Turner v. Commonwealth, 234 Va. 543, 552 & n.2, 364 S.E.2d 483 (1988), cert. denied, 486 U.S. 1017 (1988); Boggs v. Commonwealth, 229 Va. 501, 331 S.E.2d 407 (1985), cert. denied, 475 U.S. 1031 (1986); and Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984), cert. denied, 472 U.S. 1012 (1985); Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815, cert. denied, 474 U.S. 865 (1985).

concluded that "the battery to the victim was aggravated and "more culpable than the minimum necessary to accomplish an act of murder." Id. If the statutory language is itself unconstitutional, the appellate court can hardly create an appropriate narrowing construction merely by repeating that language.

The Court of Appeals upheld the validity of the "vileness" finding on the grounds that the trial court instruction "paraphrased" the definition of "aggravated battery" set forth in Smith v. Commonwealth and that the Smith limitation was in accord with Godfrey. 57 F.3d at 1372. The Opinion failed to mention the Virginia Supreme Court's refusal to fully apply the Smith v. Commonwealth standard and omitted the fact that no definition of "depravity of mind" was given to the jury.

This Court has plainly declared that aggravating circumstances with language identical to Virginia's "vileness" circumstance are too vague to provide appropriate constitutional guidance in capital sentencing decisions. The failure of Virginia courts to provide a sufficiently narrow definition of the "vileness" factor in this case warrants a grant of certiorari.

3. The Fourth Circuit's Holding that Individualized Voir Dire was Not Required to Explore the Impact of Prosecutorial Criticism of Jurors, Press Contact of Jurors and Prejudicial Pre-Trial Publicity is Contrary to this Court's Rulings in Virginia Capital Cases.

Certiorari should be granted on this question because the

Opinion below is contrary to two cases from this Court, both of which dealt with the scope of voir dire required in Virginia capital cases to protect a defendant's right to trial by an impartial jury. Mu'Min v. Virginia, 500 U.S. 415 (1991); Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). Sup. Ct. R. 10(c).

Tuggle's case was the most notorious case in the history of Smyth County, Virginia. There was substantial press in the rural area prior to trial and some press accounts contained critically inaccurate reports that Tuggle had previously been convicted of rape and was a suspect in the rape of a young girl from the area. Ten members of his jury venire had been exposed to this press and four of the sitting trial jurors had read the articles with the false rape information. Given that Tuggle's offense was only charged as capital murder because of the rape allegation, this inaccuracy was very prejudicial. When coupled with the weakness of the state's rape evidence, and the trial court's refusal to allow Tuggle expert assistance to counter the state's pathologist, this inaccurate rape publicity assumed a serious dimension in this case.

In addition, members of the Tuggle jury panel were contacted by the press less than three days before the trial after the county prosecutor ridiculed them publicly for committing a "travesty of justice" by handing out a reduced verdict in another murder case. These bizarre contacts suggested that a "lenient" ruling in Tuggle's case would expose the jurors to public criticism in their small community. Five members of Tuggle's jury venire had served

in that previous case and one of those people, Robert Brown, publicly criticized the leniency of the previous verdict. Brown eventually was made foreman of the Tuggle jury.

The trial court refused to allow any voir dire questions concerning the prosecutorial comment and pre-trial media contacts even though Tuggle's counsel argued that these events were intimidating. The trial court also refused to allow individualized voir dire concerning pre-trial press exposure and failed to allow any questions about the contents of articles read by the jury. Without such questions, Tuggle's counsel could not explore the extent to which jurors were affected by the inaccurate rape information. Despite the serious nature of the capital case, the trial court even refused to allow Tuggle to challenge any jurors for cause, a clear violation of state law.

In Turner v. Murray, 476 U.S. 28 (1986), this Court recognized the critical role that voir dire plays in ensuring the impartiality of a capital sentencing jury. Even though the Court has recognized that the constitution does not require voir dire concerning racial prejudice in criminal cases generally, Turner held that the nature of racial prejudice, the broad discretion accorded to a Virginia capital sentencing jury and the heightened reliability required in capital cases all compelled that such voir dire was constitutionally required in capital cases involving interracial crime.

In Mu'Min v. Virginia, 500 U.S. 415 (1991), the Court narrowly declared that the Sixth and Fourteenth Amendments did not always

require individualized voir dire concerning pre-trial publicity in a capital case, although it recognized that certain circumstances, such as the rural nature of the area where the crime occurred, might command the need for individualized voir dire in some cases. Mu'Min v. Virginia, 500 U.S. at 29.

The combined teachings of Mu'Min and Turner establish a few important principles. First, while voir dire is always a critical feature in protecting the Sixth Amendment guarantee to an impartial jury, it has heightened importance in a capital sentencing where the jury has broad discretion, such as that allowed by the Virginia death penalty statute. Turner v. Murray, 476 U.S. at 33-36. Second, to the extent that a capital case presents a special feature that may threaten the reliability of the jury's deliberation (e.g., racial animus), the constitution requires that voir dire be allowed on that particular feature in order to protect the integrity of the proceeding. Id. (citing Caldwell v. Mississippi, 472 U.S. 320 (1985)). Finally, while individualized, content-specific voir dire is not required in all, or even most, capital cases, the absence of such inquiry cannot be tolerated constitutionally if the facts of the case demonstrate that such questioning is the only way to protect the impartiality of the jury. The Court of Appeals rejected Tuggle's impartial jury claim without citing either Turner or Mu'min, both of which had been relied on by the District Court.

In Tuggle's case, the trial court ignored protections that are accorded to litigants in most minor civil trials in Virginia.

Allowing voir dire on prosecutorial criticism, pre-trial media contacts or on the jurors' recollection of inaccurate press reports, and letting the defense challenge jurors for cause, would have imposed no burden in Tuggle's trial. The trial court's refusal to accord these minimal protections demonstrated that, contrary to Turner, the capital proceeding did not receive the heightened protection that is constitutionally required. If anything, the unpopularity of the defendant led the trial court to provide fewer protections than in normal cases.

Certiorari is appropriate here to vindicate this Court's principle that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-9)(1983).

4. The Inability of the State's Pathologist to Determine Whether there was Penetration Compels the Conclusion that no "Rational Trier of Fact" Could have found Tuggle Guilty of Murder during the Commission of Rape.

Certiorari should be granted on this question because the Opinion below directly conflicts with the essential holding of Jackson v. Virginia, 443 U.S. 307 (1979). Sup. Ct. Rule 10(c). That case holds that the sufficiency of evidence supporting a conviction can only be challenged in a federal habeas corpus petition "if it is found upon the record evidence adduced at trial no rational trier of fact could have found proof beyond a reasonable doubt." 443 U.S. at 324. This case poses the

fundamental question of whether a "rational trier of fact," hearing medical testimony months after the crime, can find proof of rape beyond a reasonable doubt when the state's medical witness delivering the testimony explicitly testifies that he cannot find such proof.

Tuggle was charged with murder during the commission of rape. Had the murder charge been unaccompanied by the alleged rape, it would not have been capital murder in Virginia. Thus, the element of rape was critical to this case. Testimony established that the victim left a club voluntarily with Tuggle and the two were later stopped, without incident, by a state trooper. Tuggle v. Commonwealth, 228 Va. 493, 500-501, 323 S.E.2d 539, 543 (1984). When the victim's body was found four days later, her jeans were pulled down to mid-thigh. App. 122. Semen was found in the victim's rectum, although there was no bruising or injury there. Id. No semen was found in or around the victim's vagina. App. 133. There were small bruises found outside the vagina, but there were no injuries found in the vagina and there was no testimony concerning when the bruises had occurred. App. 139, 143.

Dr. Oxley, the state pathologist, was the sole witness at trial concerning the rape charge. He first testified in the preliminary hearing that the condition of the vagina suggested either "manipulation or penetration of some type" and he stated that the cause was "just as likely" manipulation as penetration. App. 13-20. At trial, Oxley volunteered on direct examination that the bruises indicated penetration of the vagina by "something, a

penis, a finger, an object, something." App. 124. But, on cross examination, he readily admitted that the bruises could have been caused by "manipulation or penetration". App. 143.

In Virginia, forcible penetration of the vagina by the defendant's penis is a necessary element of rape and the absence of semen in the vagina is a "strong circumstance" demonstrating a lack of penetration. McCall v. Commonwealth, 192 Va. 422, 65 S.E.2d 540 (1951). Here, the lack of semen or spermatozoa in or around the vagina is a strong circumstance that penetration of the vagina by the defendant's penis did not take place. The sole evidence of rape was introduced by the state through the testimony of Dr. Oxley, who, unlike the jury, was a trained pathologist and had examined the victim's body shortly after the crime. Because he could not decide whether there had even been penetration of any kind, much less penetration by the defendant's penis, no "rational trier of fact" could have found such proof beyond a reasonable doubt.

The District Court granted habeas relief on this ground, finding that the evidence was clearly insufficient to establish rape. It noted that the jury's finding of rape was "most likely explained by the inaccurate pre-trial information concerning other rapes supposedly committed by Tuggle, as well as the public pressure surrounding this notorious case, which was heightened by press contacts with jurors prior to trial." 854 F. Supp. at 1241. The Court of Appeals reversed, citing the state's testimony concerning penetration and concluding that it was "for the jury to

say" whether rape had occurred. 57 F.3d at 1370. The Court of Appeals ignored, however, the state expert's clear equivocation as to whether penetration had even occurred.

While this issue is factual, it poses a fundamental question concerning the meaning of Jackson v. Virginia. Can a "rational trier of fact" find proof beyond a reasonable doubt when the state's own evidence admittedly fails to reach that standard?

CONCLUSION

Because the Petitioner was charged with capital murder, this Court's teachings compelled special attention by the trial court to the integrity of his trial. Instead of heightened protection, Tuggle's trial was notable for its startling departures from elemental principles of fairness. Jurors were exposed to critically inaccurate publicity, criticized by the prosecution for their leniency and contacted by the media, but Tuggle's requests for the standard protections of adequate voir dire and challenges for cause were refused. Unconstitutional evidence was obtained and introduced against Tuggle in that most sensitive of proceedings, his capital sentencing, but his own motion to obtain constitutionally required assistance at his own cost was denied. Standard jury instructions needed to inform the jury of its role in sentencing were refused. These instances were not random events; as the District Court found, they were part of a consistent pattern of misconduct designed to "ensure a conviction" of an unpopular defendant.

The check against such excess is appellate review and habeas corpus. That check has been oddly ineffective in this case. All courts have acknowledged that, at the very least, Tuggle's sentencing was unconstitutional. But, despite that recognition, and despite the unique concession by the Virginia Attorney General that Tuggle should be re-sentenced, he now stands three days from execution.

The pattern of misconduct is clear in the record--there is little dispute on factual questions. The judicial recognition of constitutional error is also clear, beginning with this Court's grant of certiorari ten years ago. All that remains is a decision about whether that misconduct, that acknowledged error, can be excused. Petitioner respectfully requests that this Court grant him certiorari for the reasons stated here.

Respectfully Submitted,

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Certificate of Service

I, Donald R. Lee, Jr., a member of the Bar of this Court, hereby certify that, pursuant to Supreme Court Rule 29, I had a copy of the foregoing Petition for Writ of Certiorari, with Appendix, hand-delivered to Donald R. Curry, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219 on this 18th day of September, 1995.

Donald R. Lee, Jr.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 95-6016

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LEM DAVIS TUGGLE,

Petitioner

v.

J. D. NETHERLAND, WARDEN,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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120 pgs

QUESTIONS PRESENTED

In a case where it is undisputed that petitioner is the person who sexually assaulted and brutally murdered the victim over twelve years ago, should this Court grant a stay of execution to review:

1. A claim that this Court declined to review in 1986, that is based upon an underlying constitutional "error" that does not exist, that is barred by the "new rule" doctrine, and that fails to implicate the constitutionality of petitioner's death sentence?

2. A fact-bound "Estelle v. Smith" claim that is partially defaulted and is the same claim the Court declined to review in 1986?

3. Jury impartiality claims which are precluded by state court findings of fact, the presumption of correctness under 28 U.S.C. § 2254(d), and the "new rule" doctrine?

4. The Fourth Circuit's fact-bound application of Jackson v. Virginia?

5. A vagueness challenge to Virginia's "vileness" aggravating circumstance that fails to raise a cognizable federal issue and which this Court repeatedly has declined to review?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The 1983 Rape and Murder of Jessie Geneva Havens

The "uncontroverted" facts surrounding Lem Davis Tuggle's rape and murder of Jessie Havens are set forth at length in the published opinion of the United States Court of Appeals for the Fourth Circuit. Tuggle v. Thompson, 57 F.3d 1356, 1359-1360 (4th Cir.1995). Suffice it to say that there is no doubt that Tuggle is the person who shot and killed Ms. Havens in May of 1983, after a brutal sexual attack that included rape, anal sodomy and a bite wound Tuggle inflicted on the victim's breast.

Case History

Tuggle's conviction for the capital murder during or subsequent to the rape of Jessie Havens took place in the Circuit Court of Smyth County on January 17-19, 1984. At the penalty phase of the trial, the jury found that the Commonwealth had proved both the "future dangerousness" and "vileness" statutory aggravating circumstances beyond a reasonable doubt and fixed Tuggle's punishment at death. See Va. Code § 19.2-264.4. The trial court confirmed the jury's verdict and sentenced Tuggle to death on March 21, 1984.

Tuggle appealed his conviction and death sentence to the Supreme Court of Virginia, which affirmed both on November 30, 1984. Tuggle v. Commonwealth, 228 Va. 493, 323 S.E.2d 539 (1984). Tuggle then filed a petition for a writ of certiorari and this Court remanded the case to the Virginia Supreme Court on May 13, 1985, "for further consideration in light of Ake v. Oklahoma, 470 U.S. 68 (1985)." Tuggle v. Virginia, 471 U.S. 1096 (1985).

Upon remand, the Supreme Court of Virginia reaffirmed Tuggle's conviction and death sentence. Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985) (Tuggle II). Although the Court concluded that the trial court had erred under Ake in failing to provide Tuggle with an independent psychiatrist to assist him at the penalty-stage proceeding and that, therefore, the jury's finding of "future dangerousness" could not stand, it determined that the jury's separate finding of "vileness" independently supported Tuggle's death sentence under this Court's

decision in Zant v. Stephens, 462 U.S. 862 (1983). Tuggle II, 230 Va. at 107-111, 334 S.E.2d at 843-846 (error "neither impairs not invalidates the jury's finding of vileness").[1]

After Tuggle's petition for rehearing was denied by the Virginia Supreme Court, he filed a second petition for a writ of certiorari in this Court raising six claims, including the alleged misapplication of Zant v. Stephens by the Virginia Supreme Court. (No. 85-6011). This Court, however, denied the petition on June 30, 1986. Tuggle v. Virginia, 478 U.S. 1010 (1986).

Tuggle then filed a state habeas corpus petition, which was dismissed by the state trial court on March 18, 1991. Tuggle appealed to the Supreme Court of Virginia, but the Court refused his petition on November 14, 1991. Tuggle's third certiorari petition was denied by this Court on April 20, 1992. Tuggle v. Bair, 112 S.Ct. 1681 (1992).

On September 25, 1992, Tuggle filed a habeas petition in the United States District Court for the Western District of Virginia, Roanoke Division. On June 8, 1994, Judge James S. Turk vacated both the capital murder conviction and death sentence, finding six different grounds for relief.

The respondent appealed to the United States Court of Appeals for the Fourth Circuit. On June 29, 1995, the Fourth Circuit reversed the district court on all six grounds of relief and reinstated Tuggle's capital murder conviction and death sentence. Tuggle v. Thompson, 57 F.3d 1356 (4th Cir. 1995). In a sharply-worded opinion, the Court of Appeals stated that the district

[1] As Tuggle notes in his petition, the Commonwealth took the position in the immediate aftermath of Ake v. Oklahoma that there had been an error at the penalty stage of Tuggle's trial and that the error required resentencing. The Virginia Supreme Court agreed that there had been an error, but concluded that resentencing was not required. As will be demonstrated, however, the indisputable historical facts conclusively demonstrate that there was no Ake error in Tuggle's case. (See below at pp. 6-11).

court's opinion was cause for "considerable concern" and chastised the lower court for reviewing Tuggle's case "as if it were the original trial court without regard to prior findings of fact and numerous decisions of [the Fourth Circuit]." 57 F.3d at 1361.

Tuggle's petition for rehearing in banc was denied by the Fourth Circuit on July 25, 1995. After the state trial judge scheduled Tuggle's execution for September 21, Tuggle asked the Court of Appeals to stay its mandate and to issue a stay of execution. On August 2, 1995, the Fourth Circuit stayed its mandate for 30 days to give Tuggle time to file a petition for a writ of certiorari in this Court. The Fourth Circuit also granted a stay of execution pending further order of the court.

On August 25, 1995, Tuggle asked the Fourth Circuit to extend its stay of the mandate, and on August 30 the Court of Appeals granted Tuggle's request. On September 1, the respondent asked this Court to vacate the stay of execution. In a per curiam decision on September 14, the Court granted the respondent's application, but allowed Tuggle until September 20 to file a motion for "a further stay in this Court." Netherland v. Tuggle, 116 S.Ct. ___ (Sept. 14, 1995).

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE VIRGINIA SUPREME COURT'S APPLICATION OF ZANT V. STEPHENS DOES NOT PRESENT AN ISSUE WARRANTING THIS COURT'S REVIEW.

A. This Court denied certiorari in 1986 on the same issue Tuggle is raising again.

In Tuggle I, this Court remanded petitioner's case to the Virginia Supreme Court for reconsideration in light of Ake. The Virginia Supreme Court considered the impact of Ake and

concluded that it did not apply to the guilt stage of Tuggle's trial because he had failed to make the required threshold showing. Tuggle II, 230 Va. at 107, 334 S.E.2d at 843. The impact of Ake on the guilt stage of Tuggle's case is no longer an issue.

With respect to Tuggle's death sentence, the Virginia Supreme Court concluded that a purported Ake error invalidated the jury's "future dangerousness" finding but did not adversely affect the jury's "vileness" finding. 230 Va. at 107-111, 334 S.E.2d at 843-846. The Court then applied this Court's decision in Zant v. Stephens and reaffirmed Tuggle's death sentence on the basis of the jury's independent "vileness" finding. 230 Va. at 110-111, 334 S.E.2d at 845-846.

Tuggle then brought his case immediately back to this Court, alleging that the Virginia Supreme Court had misapplied Zant v. Stephens. (Resp. App. 1-12, excerpt from certiorari petition in No. 85-6011).[2] This Court, however, denied the petition, with Justices Brennan and Marshall dissenting, but only on the basis of their general opposition to capital punishment, not on any disagreement with the State court's application of Zant. Tuggle v. Virginia, 478 U.S. 1010 (1986).

This, then, is one of those circumstances where the significance of a denial of certiorari simply cannot be ignored. See generally Maggio v. Williams, 464 U.S. 46, 51-52 (1983). When a case returns to this Court after having been vacated and remanded for reconsideration in light of a new case, the Court has not hesitated to intervene if it disagrees with the action taken by the lower court on remand. See, e.g., Burden v. Zant, 114 S.Ct. 654 (1994) (case

[2] Citations to "Resp. App. ___" are to the Respondent's Appendix that the Warden lodged with the Court on September 19, 1995.

vacated and remanded a second time after court of appeals continued to circumvent statutory "presumption of correctness"); Ford v. Georgia, 498 U.S. 411 (1991) (certiorari granted to correct lower court's misapplication of default rule upon remand). The Court's denial of certiorari in 1986, therefore, is a strong indication that the Court found no error in the Virginia Supreme Court's action upon remand.

If there ever was an appropriate time to review the Virginia Supreme Court's decision, it was on ***direct*** appeal in 1986 when the issue was presented squarely in Tuggle's prior certiorari petition, ***not*** now after nearly ten years of exhaustive state and federal ***collateral*** review. Now that the Fourth Circuit has reviewed Tuggle's claim carefully and agreed with the Virginia Supreme Court that it has no merit, there is even less reason to grant certiorari than there was in 1986.[3]

B. The specific facts of Tuggle's case demonstrate that there was no "Ake" error.

On October 13, 1983, Tuggle filed a motion in the General District Court of Smyth County (a court not of record) seeking to be evaluated on the issues of competency to stand trial

[3] This point is underscored by the fact that, in his certiorari petition immediately after the remand, Tuggle acknowledged that the effect of Zant v. Stephens upon Virginia's "non-weighing" system of capital punishment already was a matter of firmly-established Fourth Circuit precedent. (Resp. App. 10). Indeed, since 1984, the Fourth Circuit has been applying Zant v. Stephens in the same manner it has been applied in Tuggle's case, and in all such prior instances this Court ultimately denied relief and the prisoners were executed. See L. Briley v. Bass, 742 F.2d 155, 165-166 (4th Cir.), cert. denied, 469 U.S. 893 (1984); L. Briley v. Bass, 750 F.2d 1238, 1245 (4th Cir. 1984), cert. denied, 470 U.S. 1088 (1985); Smith v. Procunier, 769 F.2d 170, 173 (4th Cir. 1985), aff'd on other grounds, 477 U.S. 527 (1986); Clanton v. Muncy, 845 F.2d 1238, 1243 (4th Cir.), cert. denied, 483 U.S. 1084 (1988); Watkins v. Murray, CA4 No. 92-4010, slip op. 9-10 n.5 (4th Cir. 1993), cert. denied, 114 S.Ct. 718 (1994). In view of this history, it would make no sense for this Court now to review in a ***collateral*** proceeding the very same claim it declined to review when Tuggle's case was before the Court on ***direct*** appeal in 1986.

and sanity at the time of the offense. In support of his motion, however, he alleged only that he had been in the penal system for a number of years, that a number of psychological evaluations and tests had been performed on him during his confinement, and that he had been evaluated at Southwestern State Hospital in approximately 1971 and had not been informed of the results. (Resp. App. 13-14). In an order entered October 14, 1983, Tuggle's motion was denied because the General District Court found no probable cause to believe that he was incompetent to stand trial or insane at the time of the offense. (Resp. App. 15).

On November 3, 1983, Tuggle requested "necessary and reasonable expenses, including expert witness fees and evaluation fees" in order to obtain an "independent pathologist, a forensic serologist, and independent ballistics examiner, and an independent odontologist;" ***he did not, however, seek funds for the appointment of an independent psychiatrist***. (Resp. App. 16-17). The trial judge denied his requests, but directed the Commonwealth to provide Tuggle with "access to such information that may be beneficial in the preparation of his defense on all matters permitted and directed by [the rules of court]." (Resp. App. 22-24).

On November 18, 1983, Tuggle moved the Circuit Court of Smyth County for a mental examination on the same two issues he had presented to the General District Court. He filed no new written motion and was allowed to rely upon the written motion previously filed in the lower court. (Resp. App. 18-19). The Commonwealth's Attorney did not agree to the motion, but did not oppose it. (Resp. App. 19-20). The trial judge granted the motion after noting that "this is a capital murder case." (Resp. App. 20).

Pursuant to the trial court's order that he be evaluated for competency and sanity, Tuggle was admitted to Central State Hospital for evaluation on November 22, 1983. On December 1,

1983, Dr. Miller M. Ryans, a forensic psychiatrist, and Dr. Arthur Centor, a licensed clinical psychologist, concluded that Tuggle was both competent to stand trial and sane at the time of the offense. The doctors' report also indicated that a conclusion had been reached with respect to Tuggle's "future dangerousness," but that the conclusion was not being reported because it had not been requested. (Resp. App. 25-26).

On December 27, 1983, Tuggle asked for an evaluation by an expert of his own choosing -- Dr. C. Robert Showalter -- with respect to his competency to stand trial and sanity at the time of the offense. The motion also asked that Tuggle be transported from Southwest Virginia to the Charlottesville, Virginia, area for the evaluation. The basis for the motion was Tuggle's assertion that he was "entitled to be examined by a psychiatrist or group of psychiatrists chosen by counsel for the defendant because of the seriousness of the charges heretofore lodged against the Defendant." ***Tuggle, however, did not request the appointment of a psychiatrist to rebut future dangerousness or to assist in gathering mitigating evidence for the penalty stage of his trial***. (Resp. App. 27-28). Indeed, ***neither the petitioner's motion nor his argument to the trial court made any reference to an alleged need for an expert for sentencing purposes.***[4] (Resp. App. 27-33).

On January 3, 1984, after noting Tuggle's previous evaluation by Drs. Ryans and Centor, the impending trial date, and the fact that logistical problems would cause a further evaluation

[4] Caught up in the hyperbole of his "Questions Presented," Tuggle falsely asserts that his request "sought to retain a defense expert to rebut the state's psychological testimony and assist in the sentencing defense." (Ptn. at i). When it comes to the historical facts and citing to the record, however, Tuggle's more truthful description of the request implicitly acknowledges that he never asked the trial court for expert assistance relating to the sentencing proceeding. (Ptn. at 4; Stay Application at 6).

to be cursory at best, the trial court denied the belated motion for a second evaluation. Specifically, the trial judge ruled that he had "granted the [prior] motion for an evaluation [only] ***because of the seriousness of the case***, and any further motion for evaluation, and specifically the motion today, is denied." (Resp. App. 33-34, emphasis added). See Tuggle II, 230 Va. at 107, 334 S.E.2d at 843.

No evidence with respect to Tuggle's sanity was presented at the guilt phase of trial. At the penalty stage, however, Dr. Centor was allowed to testify for the Commonwealth, over objection, that Tuggle showed "a high probability of future dangerousness." (Resp. App. 38). The basis for the objection, however, had nothing to do with Tuggle's present claim that he was denied an independent expert. (Pet. App. 188-199).

These indisputable facts demonstrate that there simply was no underlying Ake error in Tuggle's case. Ake error presupposes that the defendant's request for a certain type of expert assistance was denied by the trial court. See Ake, 470 U.S. at 72 (in a case where defendant made threshold showing that his sanity at time of offense would be a significant issue at trial, and where "no inquiry had been made into his sanity at the time of the offense," trial court denied request to appoint psychiatrist or grant funds for defense to hire one); Bowden v. Kemp, 767 F.2d 761, 764 (11th Cir. 1985). ***It is undisputed that Tuggle never made such a threshold showing and never requested a mental health expert with respect to the penalty-stage proceeding***. Tuggle II, 230 Va. at 108 n.2, 334 S.E.2d at 844 n.2 ("We note...that Tuggle never requested a psychiatrist to rebut future dangerousness, but only to reevaluate him as to sanity and competency to stand trial"); 28 U.S.C. § 2254(d) (state court finding of fact must be presumed correct); see also Tuggle I, 228 Va. at 503, 323 S.E.2d at 544-545 (applying default

rule to claim because not raised at trial). The request that Tuggle did make at the guilt stage, moreover, was one that Ake expressly disallowed -- a request for a psychiatrist of his own choosing. See Ake, 470 U.S. at 83. ***And, most importantly, the trial court granted Tuggle's request for an examination and he was evaluated by both a psychiatrist and a clinical psychologist; nothing in Ake required the trial court to keep appointing experts until one rendered an opinion favorable to Tuggle***.

The essence of Tuggle's Ake claim is that he supposedly was denied access to an expert who ***might*** have helped him rebut the prosecution's expert opinion regarding "future dangerousness." The prosecution's non-expert evidence of Tuggle's "future dangerousness," however -- his prior murder and escape convictions -- rendered the brief expert testimony from Dr. Centor presented by the prosecution little more than a statement of the obvious. (Resp. App. 38). See Tuggle I, 228 Va. at 517, 323 S.E.2d at 554 (petitioner's prior record). Tuggle's brutal rape and murder of Ms. Havens, moreover, provided additional compelling evidence of his dangerousness and stood in stark contrast to the absence -- both past and present -- of any substantial mitigating circumstances.

In view of Tuggle's failure to request expert assistance at the penalty stage and ***his continued failure to proffer any evidence*** that such assistance would have borne fruit, there is no reason to believe the jury's sentencing verdict would have been any different if the purported Ake error had not occurred. See Brecht v. Abrahamson, 113 S.Ct. 1710, 1722 (1993) ("substantial and injurious effect or influence in determining the jury's verdict"). Indeed, based upon the record Tuggle presents to this Court, there is no reason to believe that, if Tuggle had been evaluated by yet another expert, the third expert would have reached a conclusion any

different than that reached by Drs. Centor and Ryans. Surely, it was Tuggle's burden during the near decade of state and federal habeas proceedings to produce some evidence to show that he was prejudiced by the alleged error, a burden he never even has attempted to bear.

This Court, therefore, should not grant certiorari to review a claim that is based upon a fundamental misunderstanding of law and fact. The Virginia Supreme Court's application of Zant v. Stephens is not constitutionally significant because the purported underlying Ake "error" -- the only thing that made the application of Zant v. Stephens even relevant to Tuggle's case -- was simply non-existent.

C. Tuggle's claim is barred by the "new rule" doctrine.

The Fourth Circuit determined that the Virginia Supreme Court correctly applied Zant v. Stephens to Tuggle's case. Tuggle, 57 F.3d at 1362-1364. Tuggle now asks this Court to review the Fourth Circuit's determination. This is a federal collateral case, however, and neither the Fourth Circuit nor this Court is free to second-guess the Virginia Supreme Court's judgment unless Tuggle overcomes the "new rule" doctrine.

Under Caspari v. Bohlen, 114 S.Ct. 948, 956 (1994), the issue is not whether the Virginia Supreme Court was "correct" when it applied Zant v. Stephens and sustained Tuggle's death sentence, but "whether a state court considering [Tuggle's] claim at the time his conviction became final [in 1986] would have felt compelled by existing precedent to conclude" that Tuggle's death sentence was constitutionally invalid. See also Goeke v. Branch, 115 S.Ct. 1275, 1277 (1995) (whether "the result was dictated by precedent"). As the Fourth Circuit's decision amply demonstrates, even today reasonable jurists may conclude that, under the circumstances of Tuggle's case, Zant v. Stephens can be applied in the context of a non-weighing State such

as Virginia, and a death sentence premised upon findings of both "future dangerousness" and "vileness" may be sustained even if the state appellate court has struck the "future dangerousness" finding because of a purported constitutional error relating solely to that finding.

Tuggle's claim thus is barred by the "new rule" doctrine.[5] His claim clearly does not fall within either exception to the doctrine, and it would be both inappropriate and futile to grant certiorari to review such a claim.

D. The Fourth Circuit correctly determined that the purported error with respect to the jury's "future dangerousness" finding did not invalidate Tuggle's death sentence.

1. *Stringer v. Black*

In Stringer v. Black, 503 U.S. 222 (1992), this Court concluded that when it comes to the issue of whether a death sentence may be sustained despite the presence of an invalid aggravating circumstance:

> the difference between a weighing State and a non-weighing State is not one of "semantics,"...but of critical importance. ***In a non-weighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty.*** Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, ***there is no constitutional violation*** resulting from the introduction of the invalid factor in an earlier stage of the proceeding.

503 U.S. at 231-232 (emphasis added).

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[5] A claim concerning whether a death sentence may be sustained despite the presence of an invalid aggravating circumstance clearly is a claim subject to the "new rule" analysis. See Stringer v. Black, 503 U.S. 222, 229-237 (1992).

The Fourth Circuit correctly concluded that Virginia is a "non-weighing" State. Tuggle, 57 F.3d at 1362, citing Swann v. Commonwealth, 441 S.E.2d 195, 205 (Va. 1994), cert. denied, 115 S.Ct. 234 (1994). The Court of Appeals also correctly concluded that, because Virginia is a "non-weighing" State, the purported Ake error did not adversely affect the jury's separate finding of "vileness," and that the Virginia Supreme Court properly applied Zant v. Stephens to sustain Tuggle's death sentence after determining that the purported error with respect to the jury's "future dangerousness" finding would not have made a difference to the sentencing decision. Tuggle, 57 F.3d at 1363-1364; Tuggle II, 230 Va. at 111, 334 S.E.2d at 846 ("neither impairs nor invalidates the jury's finding of vileness"); compare Zant v. Stephens, 462 U.S. at 873 (jury's consideration of invalid statutory aggravator had "inconsequential impact" on sentencing verdict).

2. ***Lowenfield v. Phelps***

Purported errors with respect to either of Virginia's statutory aggravating factors are not constitutionally significant because the constitutional function of aggravating circumstances is solely to narrow the class of murderers eligible for a death sentence; they are not ends unto themselves. See Lowenfield v. Phelps, 484 U.S. 231, 244 (1988). As the Fourth Circuit recognized, in Virginia the constitutionally-required narrowing is accomplished at the guilt stage when the defendant is convicted of a very narrow species of capital murder. See Tuggle, 57 F.3d at 1373.

In Tuggle's case, therefore, all of the constitutionally-required narrowing was accomplished when the jury convicted him of premeditated murder during, or subsequent to, the commission of rape. Tuggle received additional (but not constitutionally-required) protection

when, before it sentenced him to death, the jury found that his crime was "vile" in that it involved "torture," "aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder" or "depravity of mind." Thus, the purported error with respect to the jury's separate finding of "future dangerousness" simply does not implicate the constitutionality of Tuggle's death sentence.

Petitioner's reliance on Johnson v. Mississippi, 486 U.S. 578 (1988), is misplaced because, as the Fourth Circuit noted, Mississippi, unlike Virginia, is a "weighing" State. Tuggle, 57 F.3d at 1363. Indeed, in Romano v. Oklahoma, 114 S.Ct. 2004 (1994), this Court held that, even in a "weighing" State, "Johnson does not stand for the proposition that the mere admission of irrelevant and prejudicial evidence requires the overturning of a death sentence." 114 S.Ct. at 2011. If, as in Romano, the admission of "irrelevant and prejudicial evidence" did not prevent the appellate court of a "weighing" State from reweighing the evidence and finding "that the death penalty [nevertheless] was warranted," id., then certainly there was nothing to prevent the Virginia Supreme Court from reaffirming Tuggle's death sentence after concluding that despite the purported error the death penalty was warranted by the jury's unaffected "vileness" finding.

E. There is no "conflict" warranting the grant of certiorari.

Tuggle asserts that this Court should grant certiorari to resolve a "conflict" between the Fourth Circuit's decision in his case and a "decision' of the Eleventh Circuit in Buttrum v. Black, 908 F.2d 695 (11th Cir. 1990). Buttrum, however, is merely a one-paragraph, per curiam affirmance of a district court's opinion granting the writ. While the Eleventh Circuit apparently agreed with the district court's decision, a one paragraph "decision" wholly devoid

of analysis hardly can be viewed as the considered opinion of a federal appeals court that could serve as a basis for granting certiorari.

The district court decision which the Eleventh Circuit affirmed, moreover, underscores important differences between Buttrum and Tuggle's case -- differences that not only show that there is no "conflict," but also demonstrate why Tuggle is not entitled to relief: in Buttrum, the defendant's request was expressly related to the penalty phase of trial and to rebutting the prosecution's expert testimony on the issue of dangerousness. See Buttrum v. Black, 721 F. Supp. 1268, 1308-1309 (N.D. Ga. 1989). Tuggle, on the other hand, is bound by the state court finding of fact that he "never requested a psychiatrist to rebut future dangerousness, but only to reevaluate him as to sanity and competency to stand trial." Tuggle II, 230 Va. at 108 n.2, 334 S.E.2d at 844 n.2; 28 U.S.C. § 2254(d).

Just as importantly, the prisoner in Buttrum, unlike Tuggle, demonstrated prejudice from the trial court's denial of her request. During her habeas proceedings, she produced affidavits from three mental health experts which the district court concluded "could likely have refuted" the prosecution's expert on the issue of dangerousness. Buttrum, 721 F. Supp. at 1309-1310,

1313. ***Tuggle never has presented any evidence controverting Dr. Centor's opinion that he is "future dangerous."***[6]

II. TUGGLE'S ESTELLE V. SMITH CLAIM IS PARTIALLY DEFAULTED AND, IN ANY EVENT, IS THE SAME CLAIM THAT THIS COURT DECLINED TO REVIEW IN 1986.

Tuggle raised a claim under Estelle v. Smith, 451 U.S. 454 (1981), on direct appeal in the Virginia Supreme Court, but the claim and his specific assignment of error were premised solely upon the Sixth Amendment. Tuggle I, 229 Va. at 513-515, 323 S.E.2d at 551-552. To the extent Tuggle now is relying upon the Fifth Amendment, his Estelle v. Smith claim is procedurally barred. See Coleman v. Thompson, 501 U.S. 722, 750 (1991).

The Fourth Circuit, moreover, correctly recognized that under Virginia's "non-weighing" system, an alleged Estelle v. Smith error with respect to the jury's "future dangerousness" finding did not invalidate Tuggle's sentence. The Court of Appeals affirmed the validity of Tuggle's death sentence solely on the basis of the jury's "vileness" finding -- which the Virginia Supreme Court had affirmed as independently supporting Tuggle's sentence. Tuggle, 57 F.3d at 1374.

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[6] Tuggle also suggests that the Court should grant certiorari to resolve a "conflict" between the Fourth Circuit's decision and a recent decision from the Virginia Supreme Court. This argument is frivolous. Mickens v. Commonwealth, 249 Va. 423, 457 S.E.2d 9 (1995), was a case where the Virginia Supreme Court vacated a prisoner's death sentence after this Court remanded for reconsideration in light of Simmons v. South Carolina, 114 S.Ct. 2187 (1994). There is, of course, no claim of Simmons error in Tuggle's case. Nor does the Virginia Supreme Court's decision in Mickens address the issue of whether the Simmons error required resentencing in view of the jury's separate finding of "vileness." Finally, Mickens does not purport to overrule the Virginia Supreme Court's express ruling in Tuggle II. On the issue before this Court, there clearly is no conflict between the Virginia Supreme Court and the Fourth Circuit.

Finally, even if the Court could reach the merits of Tuggle's claim, it would not entitle him to relief. In Estelle v. Smith, the trial judge sua sponte ordered that the defendant undergo a mental competency examination, without any notice to the defendant's counsel. 451 U.S. at 457, 471. During that examination, the defendant made statements without being advised of his Miranda rights. Id. at 461. Here, the mental examination by Drs. Centor and Ryans was conducted at the request of Tuggle's counsel.[7] Tuggle, moreover, was fully advised of his Miranda rights, including a warning that any statements he made could be used against him at a sentencing hearing and he signed a written waiver of his right to counsel. Tuggle I, 228 Va. at 514, n.11, 323 S.E.2d at 551-552, n.11. See Buchanan v. Kentucky, 483 U.S. 402, 422-424 (1987) (limiting Estelle v. Smith to its "distinct" facts).[8] The state court's fact-specific application of the standard established in Estelle v. Smith certainly does not warrant certiorari

[7] There is no support in the record for Tuggle's contention that the trial court's order "explicitly confin[ed]" the mental evaluation to the issues of competency to stand trial and sanity at the time of the offense, or that the evaluation by Dr. Ryans and Centor somehow violated the court's order. (Ptn. at i, 3, 13, 19). The court's order merely cited the Virginia statutes regarding competency and sanity evaluations, but did not purport to put any limitations upon the doctors making the evaluations. (Resp. App. 24). Similarly, without support is Tuggle's allegation that the doctors "expanded" their examination of Tuggle beyond what was necessary to determine his competency and sanity. (Ptn. at 4). The most that can be concluded fairly from the doctors' report -- and Tuggle has not shown otherwise during almost ten years of habeas proceedings -- is that during the course of the competency and sanity evaluations ***which Tuggle's trial attorneys requested*** the doctors "formed an opinion as to the issue of the probability of future dangerousness." (Resp. App. 25). Thus, petitioner's allegation that the doctors conducted a "secret, uncounseled interview" on the issue of "future dangerousness" must be rejected. (Ptn. at 16).

[8] A federal habeas court would violate the "new rule" doctrine by ruling in Tuggle's favor because, when the Virginia Supreme Court rejected his Estelle v. Smith claim, a ruling in Tuggle's favor was not "compelled" or "dictated by precedent." See Goeke v. Branch, 115 S.Ct. at 1277; Caspari v. Bohlen, 114 S.Ct. at 956.

review. This Court, therefore, should deny review just as it did in 1986 when Tuggle raised the very same claim. (Resp. App. 2).

III. TUGGLE'S FACT-SPECIFIC CLAIMS REGARDING THE IMPARTIALITY OF HIS JURY DO NOT WARRANT CERTIORARI REVIEW.

The Fourth Circuit carefully reviewed the facts surrounding all of Tuggle's jury claims, applied well-established principles of law, and determined that he had not been denied a fair trial. Tuggle, 57 F.3d at 1364-1369. This Court does not grant certiorari to review facts or to review a court of appeals' application of established legal standards to a particular set of facts. See United States v. Johnson, 268 U.S. 220, 227 (1925). Indeed, this no doubt was the reason this Court declined to review these claims in 1986. (Resp. App. 3).

As the Court of Appeals noted, the district court was able to grant relief on Tuggle's jury claims only by ignoring the Virginia Supreme Court's factual determination that his jury was fair and impartial, as well as ignoring the "presumption of correctness" under 28 U.S.C. § 2254(d). See Tuggle, 57 F.3d at 1367 ("The district court...failed to follow the clear language and procedures set forth in the federal statute"). Once the Virginia Supreme Court's factual findings are presumed correct, as they must be under § 2254(d), Tuggle's pretrial publicity and change of venue claims clearly are unworthy of certiorari review.

Tuggle's claims that he was constitutionally entitled to individual voir dire about alleged pretrial contacts and to exercise his challenges for cause outside the jury's presence are defaulted because they were raised in the Virginia Supreme Court on direct appeal only as state law claims. See Tuggle I, 228 Va. at 504-506, 323 S.E.2d at 545-546. Even if they were not defaulted, it certainly would violate the "new rule" doctrine to create such new rules of criminal

procedure on federal collateral review.[9] See Caspari v. Bohlen, 114 S.Ct. at 956. And, as the Fourth Circuit held, Tuggle failed to demonstrate that he was prejudiced by the state trial court's rulings because he *never* has proffered what questions he would have asked on individual voir dire or which jurors he would have challenged for cause if he could have made such challenges outside the jury's presence.[10] Tuggle, 57 F.3d at 1368.

IV. TUGGLE HAS GIVEN THIS COURT NO REASON TO REVIEW THE FOURTH CIRCUIT'S FACT-SPECIFIC APPLICATION OF THE JACKSON V. VIRGINIA STANDARD.

This Court does not grant certiorari to review a court of appeals' fact-bound application of a firmly-established legal standard. See Johnston, 268 U.S. at 277. Here, Tuggle's claim that the evidence was insufficient to prove that he raped the victim is governed by the standard established in Jackson v. Virginia, 443 U.S. 307 (1979). The Fourth Circuit reviewed the facts of Tuggle's case in great detail, gave proper deference to the jury's authority to draw reasonable inferences from those facts, and had no difficulty determining that the evidence satisfied the deferential Jackson standard. Tuggle, 57 F.3d at 1369-1371. Tuggle's claim that the Fourth Circuit erroneously applied Jackson to the facts of his case clearly does not warrant granting

[9] Tuggle's third "Question Presented" asks for a ruling in his favor based upon the "combined teachings" of Turner v. Murray, 476 U.S. 28 (1986), and Mu'Min v. Virginia, 500 U.S. 415 (1991). (Ptn. at ii, 28-29). Since the "combined" force of Turner and Mu'Min could not have come into being until 1991 when the latter was decided, and since Tuggle's case became final in June of 1986 when this Court denied certiorari in Tuggle II, Tuggle clearly is asking for the benefit of an impermissible new rule that, even if it existed, could not be applied retroactively in this collateral proceeding.

[10] As the Fourth Circuit correctly noted, moreover, the alleged pretrial contacts with jurors concerned jury service ***in a case completely unrelated to Tuggle's***. Tuggle, 57 F.3d at 1368-1369.

certiorari because the claim has no potential impact beyond the parameters of this case. See Hamling v. United States, 418 U.S. 87, 124 (1974) ("primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals"). This Court simply does not grant certiorari to review mere claims of error. See Ross v. Moffitt, 417 U.S. 660, 616-617 (1974).

Acceptance of Tuggle's claim of evidentiary insufficiency, moreover, would require such a far-fetched application of Jackson that a ruling in Tuggle's favor would violate the "new rule" doctrine. See Wright v. West, 505 U.S. 277, 291-292 n.8 (1992) (Thomas, J.). As the Fourth Circuit's recitation of the evidence of rape shows, a rational factfinder clearly could have concluded that the victim's vagina had been penetrated by Tuggle's penis. Tuggle, 57 F.3d at 1370. An application of Jackson that reached a contrary result would be so novel that the result would constitute a "new rule." See West, 503 U.S. at 315-316 (Souter, J., concurring); Stringer, 503 U.S. at 228 (doctrine is violated when "an old rule" is applied "in a manner...not dictated by precedent").

V. PETITIONER'S VAGUENESS CHALLENGE TO VIRGINIA'S "VILENESS" AGGRAVATING FACTOR DOES NOT IMPLICATE THE CONSTITUTIONALITY OF HIS DEATH SENTENCE.

As previously noted, the prosecution must prove at the guilt stage of a Virginia capital trial, not only that the defendant committed a premeditated murder, but also that the murder was committed in one of several enumerated aggravating circumstances. See Va. Code § 18.2-31. In Tuggle's case, he was convicted of premeditated murder during the commission of, or subsequent to, a rape. See Va. Code § 18.2-31(5).

At the penalty phase of a Virginia capital murder trial, moreover, before the defendant even becomes eligible for a death sentence, the prosecution must prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society" and/or that his conduct in committing the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." See Va. Code § 19.2-264.4C. In Tuggle's case, the jury found the existence of both "future dangerousness" and "vileness."[11] Even then, however, the jury was free under Virginia law and the court's instructions to impose a life sentence rather than a death sentence. (Resp. App. 40).

Aggravating factors are not ends unto themselves; their constitutional function is to narrow the class of those eligible for a death sentence beyond those who commit any premeditated murder. Lowenfield, 484 U.S. at 244-246. In Virginia, this limiting function is accomplished at the guilt stage when the defendant is convicted of a narrow species of capital murder. Thus, when Tuggle was convicted of a premeditated murder during the commission of a rape, no further narrowing was constitutionally required. See Gregg v. Georgia, 428 U.S. 153, 164 n.9 (1976) (approving constitutionality of state system where aggravator to be proved at penalty stage is that murder was committed during rape). Accordingly, even if Tuggle's claim about the alleged vagueness of Virginia's "vileness" aggravator had merit -- and clearly it does not -- it would raise only a matter of state law and would not affect the constitutionality of his death sentence. See generally Michigan v. Long, 463 U.S. 1032, 1038 (1983) (no jurisdiction

[11] With respect to the "aggravated battery" component of the "vileness" factor, the jury was instructed that the "aggravated battery" must be "beyond the minimum necessary to accomplish the act of murder." See Tuggle, 57 F.3d at 1371-1372.

to review state law issues on certiorari). It is no doubt for this reason that this Court repeatedly has denied certiorari petitions from Virginia prisoners raising this claim. See, e.g., Williams v. Virginia, 115 S.Ct. 2616 (1995); Cardwell v. Virginia, 115 S.Ct. 1826 (1995); Breard v. Virginia, 115 S.Ct. 442 (1994).

Tuggle's vagueness challenge, moreover, simply has no merit. Vagueness review is required to be "quite deferential." Tuilaepa v. California, 114 S.Ct. 2630, 2632 (1994). So long as the aggravating factor has a "common-sense core of meaning," it must be upheld. Id. at 2635. The Fourth Circuit repeatedly has upheld the constitutionality of Virginia's "vileness" factor as it has been construed, limited and applied by the Virginia Supreme Court. See, e.g., Tuggle, 57 F.3d at 1371-1374; Turner v. Williams, 35 F.3d 872, 891-892 (4th Cir. 1994), cert. denied, 115 S.Ct. 1359 (1995); Jones v. Murray, 976 F.2d 169, 174-175 (4th Cir.), cert. denied, 113 S.Ct. 27 (1992); Bunch v. Thompson, 949 F.2d 1354, 1367 (4th Cir. 1991), cert. denied, 112 S.Ct. 3056 (1992). This Court should defer to the Fourth Circuit's view. See Frisby v. Schultz, 487 U.S. 474, 482 (1988) (deference warranted because lower federal courts "better schooled in and more able to interpret the laws of their respective States").[12]

[12] Finally, it would be an impermissible creation of a "new rule" for a federal habeas court to rule that Virginia's "vileness" factor is unconstitutionally vague. Such a new rule could be established only by this Court on direct appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES S. GILMORE, III
Attorney General of Virginia

DONALD R. CURRY
Senior Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, a copy of the foregoing Respondent's Brief in Opposition was hand-delivered to the offices of Timothy M. Kaine, Mezullo and McCandlish, 1111 East Main Street, Suite 1500, Richmond, VA 23219, counsel for petitioner.

Donald R. Curry
Senior Assistant Attorney General

No. _____
A-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LEM DAVIS TUGGLE,

Petitioner

v.

J. D. NETHERLAND, WARDEN,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Fourth Circuit

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RESPONDENT'S APPENDIX

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1985

LEM DAVIS TUGGLE, JR.,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

Jeffrey M. Gleason
Martin & Martin
415 Fourth Street, N.E.
Charlottesville, Virginia 22901
(804) 296-4151

QUESTIONS PRESENTED

1. Did the denial of petitioner's request for an independent psychiatric evaluation for the purpose of preparing for the guilt/innocence phase of his capital murder trial violate his due process right to this evaluation?

2. Under the facts of this case, did the denial of petitioner's request for access to an independent psychiatric evaluation for the purpose of preparing his defense to a capital murder charge violate his Sixth Amendment and Equal Protection rights to this evaluation?

3. Where the appellate court rules that the trial court erred in failing to provide a defendant with the psychiatric assistance he sought for the purpose of preparing for the sentencing phase of his capital murder trial, does this Court's decision in Zant v. Stephens require the death sentence to be affirmed so long as the jury finds two aggravating circumstances, one of which is "future dangerousness?"

4. Can a defendant in a capital case who is asked to undergo an examination of his future dangerousness without the knowledge of his attorney, be deemed to have waived his Sixth Amendment right to counsel simply by showing that he signed a printed form containing Miranda warnings, without giving notice of an intent to conduct the evaluation to defense counsel and without giving the defendant an opportunity to consult with his attorney prior to undergoing the examination?

5. Can a defendant in a capital case ever waive his Fifth Amendment right against self-incrimination when undergoing a pretrial psychiatric evaluation, so to allow the results of the examination to be used against him at the sentencing phase of the trial, without first putting his mental state in issue?

6. Can a trial court forbid any inquiry into pretrial contact with members of a defendant's jury panel by a news reporter and a member of the sheriff's department, and forbid any detailed inquiry into the effect of extensive pretrial publicity, and still accord a defendant his right to be tried by an impartial jury?

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223-224).

At the conclusion of the voir dire, Tuggle requested permission to bring his motions to strike for cause out of the presence of the panel. (JA - 242). The court stated that the panel was qualified and instructed counsel to move on to their preemptory strikes. (JA - 243). Tuggle reiterated that he wished to challenge a number of the jurors for cause, but was not permitted to do so. (JA - 243).

At the sentencing phase of the trial, the Commonwealth first introduced records showing that Tuggle had previously been convicted of second degree murder, and had pleaded guilty to grand larceny and escape from jail. The first two convictions occurred in March of 1972 and the third conviction occurred in May of 1972. (JA - 637-639). The Commonwealth then called Dr. Centor to testify. Although Tuggle objected to the introduction of any testimony from Dr. Centor, the court permitted Centor to testify that, based on his earlier examination of Tuggle, he concluded that Tuggle "shows a high probability of future dangerousness." (JA - 541). Because Tuggle had been denied access to the independent psychiatric evaluation he sought, he was unable to present any psychiatric evidence on his own behalf. After hearing this evidence, the jury sentenced Tuggle to death. (JA - 158).

SUMMARY OF ARGUMENT

The Virginia Supreme Court's treatment of this case on remand requires this Court to grant certiorari with respect to the Ake claim and reverse his conviction and sentence for several reasons. First, the Virginia Supreme Court applied too stringent a standard for measuring Tuggle's entitlement to expert psychiatric assistance for the purpose of preparing for the guilt/innocence phase of his trial. By relying solely on the facts presented in Ake as the yardstick for making this determination, it has established so high a standard for measuring an indigent's entitlement to this assistance that few criminal defendants are likely to

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qualify for the assistance sought. This Court should grant certiorari to correct this misapplication of Ake. It should apply a standard for measuring Tuggle's showing that sanity is likely to be a significant factor at his trial that accurately reflects the reasons underlying a defendant's constitutional entitlement to this assistance and reverse his conviction because the state failed to provide this assistance.

Secondly, the Virginia Supreme Court simply ignored Tuggle's Sixth Amendment and equal protection arguments. When Tuggle's attorneys made their request for access to an independent psychiatric evaluation, they made arrangements to pay for the evaluation themselves and did not request state funds for this purpose. Even so, the trial court denied them access to the evaluation they sought, with no sound basis for doing so. Under these facts, Tuggle's Sixth Amendment and equal protection claims provide even more fundamental constitutional grounds for entitlement to the assistance he sought than the due process grounds relied on in Ake. This Court should grant certiorari to consider these claims.

Finally, the Virginia Supreme Court did conclude that the trial court erred in not providing Tuggle with the assistance he sought for the sentencing phase of his trial, once the State introduced testimony from a psychiatric expert on the issue of future dangerousness. However, it concluded that Zant v. Stephens, 462 U.S. 862 (1983) required reaffirmation of his death sentence because the jury found the aggravating circumstance of "vileness" in addition to "future dangerousness." The Court reached this conclusion despite the State's concession, in its brief and at oral argument, that the trial court's error required Tuggle to be resentenced, Zant v. Stephens notwithstanding.

This Court has recently granted certiorari to consider a similar interpretation of Zant v. Stephens reached by the Fourth Circuit Court of Appeals in another Virginia case. Smith v. Sielaff, ___ U.S. ___, 106 S.Ct. 245 (1985). One possible resolution of this issue would be to hold this case pending disposition of Smith v. Sielaff and to remand this case

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for further disposition in light of that case. However, such a step seems unnecessary in light of the error at issue. The trial court's refusal to provide Tuggle with the psychiatric assistance he sought in preparation for the sentencing phase of his trial so obviously affected his fundamental rights to confront the State's expert witness at sentencing and to present evidence in mitigation that the more appropriate resolution of this issue would be to grant certiorari and summarily reverse his death sentence.

With regard to Dr. Centor's testimony on behalf of the State at the sentencing phase of Tuggle's trial, this Court should grant certiorari to correct the Virginia Supreme Court's misapplication of this Court's ruling in Estelle v. Smith, 451 U.S. 454 (1981). The Virginia Supreme Court's ruling on this issue raises two important questions of constitutional law that should be settled by this Court. The first question involves the proper standard that should be applied to determine a valid waiver of the Sixth Amendment right to counsel in the context of a psychiatric evaluation on the issue of future dangerousness, conducted for the purpose of developing prosecution evidence for the sentencing phase of a capital trial. Underlying this question is the confusion among the federal circuit courts over the proper standard to use in evaluating the validity of a waiver of the Sixth Amendment right to counsel as opposed to the Fifth Amendment right to counsel.

The broader question presented by this issue is when, if ever, the results of a pretrial psychiatric examination can be used against a defendant at the sentencing phase of a capital trial, without the defendant first having put his mental state in issue. Because this Court will also consider this issue in Smith v. Sielaff, supra, it may be resolved here by holding this case pending a decision in Smith and to remand for further disposition in light of that case.

This Court should grant certiorari with regard to the voir dire issue because of the Virginia Supreme Court's improper deference to the trial court's discretion in limiting Tuggle's ability to voir dire his jury panel. When Tuggle attempted to select an impartial jury to decide this

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case, the trial court prohibited him from conducting any meaningful voir dire, even though the court knew of potentially prejudicial contact with members of the panel by a reporter and a member of the sheriff's department the night before trial, and even though there had been extensive pretrial publicity containing highly prejudicial and inaccurate statements and reports that had no place in the deliberations of the merits of Tuggle's case. Finally, when Tuggle attempted to make motions to strike panel members for cause, the court refused to permit him to do so.

Nothing is more sacred to our system of criminal justice than the right to be tried by an impartial jury. Yet the Virginia Supreme Court fails to recognize minimal requirements, beyond a court's discretion, needed to assure a criminal defendant that he is afforded this right. This Court should grant certiorari to consider the important constitutional concerns underlying this issue.

LEM DAVIS TUGGLE WAS DENIED ACCESS TO AN INDEPENDENT PSYCHIATRIC EVALUATION IN VIOLATION OF HIS RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS

When the Virginia Supreme Court considered the issue of Tuggle's request for an independent psychiatric examination in his initial appeal, it concluded that Tuggle, having been examined at his own request, had no constitutional right to further evaluation. Tuggle I, 323 S.E. 2d at 545. This Court subsequently vacated judgment and remanded the case to the Virginia Supreme Court "for further consideration in light of Ake v. Oklahoma, 470 U.S. ___ (1985)." Tuggle v. Virginia, 471 U.S. ___, 105 S.Ct. 2315 (1985). The Virginia Supreme Court then directed counsel "to brief and argue the question of Ake's impact on Tuggle's conviction and sentence."

Tuggle renewed his position on remand that he was constitutionally entitled to the psychiatric assistance he sought. He not only was entitled to state funds allowing him "access to a competent psychiatrist who will conduct

expert in preparing his case, the court has no justification for interfering with this decision, absent a request that the state provide funds for the expert. Were it otherwise, it would be the court, and not defense counsel, who would be making the tactical decisions. The court would be left to decide what is required to effectively represent a defendant in any given case.

When the trial court refused to give Tuggle access to the psychiatric evaluation he sought, even though he did not request state funds for this purpose, Tuggle's Sixth Amendment right to the effective assistance of counsel and his rights guaranteed by the Equal Protection Clause were violated. Because of this fundamental trial error, his conviction must now be reversed.

B.

THE TRIAL COURT'S REFUSAL TO GRANT TUGGLE THE PSYCHIATRIC ASSISTANCE HE SOUGHT IN PREPARING FOR THE SENTENCING PHASE OF HIS TRIAL CONSTITUTES REVERSIBLE ERROR

On December 16, 1983, Dr. Arthur Centor, the state psychologist who participated in Tuggle's evaluation at Central State Hospital, was subpoenaed to appear at Tuggle's trial on behalf of the Commonwealth. (JA - 73). He was the only witness to testify on behalf of the Commonwealth at the sentencing proceeding[13] and was called solely for the purpose of testifying that, based on his earlier evaluation, it was his opinion that Tuggle showed "a high probability" that he would commit future acts of violence. (JA - 340-342). Because of Ake's holding that "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase" when the State presents psychiatric evidence of the defendant's future dangerousness, Ake, at 1097, Tuggle argued on remand to the Virginia Supreme Court that his death sentence must be reversed because the State failed to provide him access to the psychiatric assistance he sought.

[13] The Commonwealth did call the clerk of the Court, but only for the purpose of introducing records of Tuggle's prior convictions. (JA - 519-520)

In his brief on remand, Tuggle specifically argued that Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2977 (1983) could not be relied on to uphold his death sentence because of the nature of the constitutional error involved. Brief of Appellant, dated May 30, 1985, pp. 30-32. The State agreed:

> Because the Commonwealth introduced psychiatric testimony that the defendant presented a future danger, and because the defendant was not provided with an independent psychiatrist to attempt to rebut this testimony, the defendant's case would appear to be within the line of cases in which Ake mandates the appointment of an independent psychiatrist to assist the defendant in preparing for the sentencing phase of his trial. Accordingly, the Commonwealth submits that the defendant's case should be remanded to the Circuit Court of Symth County for resentencing by a different jury.

Brief on Behalf of the Commonwealth, dated June 7, 1985, p. 21.

At oral argument held on June 20, 1985, the Court questioned the State closely on its position that Tuggle was entitled to a new sentencing hearing. The State justified its position on the ground that Zant v. Stephens was inapplicable to the facts presented by Tuggle's case.

The Virginia Supreme Court disagreed with both Tuggle and the State. Citing Zant v. Stephens as support for the broad proposition that

> [w]hen a jury makes separate findings of separate statutory aggravating circumstances, any of which could support a sentence of death, and one of the circumstances subsequently is invalidated, the remaining valid circumstances, or circumstances, will support the sentence.

Tuggle II, 334 S.E.2d at 895, it concluded that "[a]lthough Ake requires the conclusion that the trial court erred in denying Tuggle an independent psychiatrist once the Commonwealth had submitted psychiatric evidence on the issue of future dangerousness, we hold, nevertheless, that the error neither impairs nor invalidates the jury's finding of vileness." Id at 846.

Zant v. Stephens is clearly inapposite. The sole issue in Zant v. Stephens was "whether respondent's death sentence must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld." Zant v.

Stephens, 462 U.S. at 864. There was no contention that Stephens was prohibited or inhibited in any manner in presenting his defense at sentencing. Cf. Eddings v. Oklahoma, 455 U.S. 104 (1982); Gardner v. Florida, 430 U.S. 349 (1977).

Under the Georgia death penalty statute, the jury need only find one aggravating circumstance in order to consider whether to impose the death penalty. Once this threshold is passed, the jury has absolute discretion, based on the evidence before it, in deciding what sentence to impose. In Stephens' case, all of the prosecution's evidence introduced at sentencing would have been admissible even if the prosecution had not attempted to prove the invalid circumstance. Since the jury properly considered the option of the death penalty after finding two valid aggravating circumstances, and since all of the evidence relied on by the jury in exercising its discretion and imposing the death sentence was properly before it, the death sentence was affirmed.

Zant v. Stephens was never meant to serve as a wholesale invitation to appellate courts to ignore constitutional infirmities in the sentencing phase of a capital trial, so long as more than one aggravating circumstance is found.[14] Yet that is how the decision is being applied in Virginia. See also Smith v. Procunier, 769 F.2d 170 (4th Cir.), cert. granted sub non Smith v. Sielaff, ___ U.S.___, 106 S.Ct. 245 (1985).

Contrary to the Virginia Supreme Court's opinion, the failure of the trial court to allow Tuggle access to a psychiatric expert to assist him at the sentencing phase of his trial does not only affect the aggravating circumstance of future dangerousness. It is an error that strikes at the heart of the constitutional validity of the entire sentencing procedure in this case. The error denied Tuggle the tools to vigorously meet and challenge the State's expert witness at sentencing, as well as the opportunity to develop and present mitigating evidence on his own behalf.

[14] On the contrary, the Court was careful to point out that "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim error." Zant v. Stephens at 885.

Ake recognizes that whenever psychiatric issues are present, it is necessary to have the assistance of a psychiatric expert who "know[s] the probative questions to ask of the opposing party's psychiatrists and how to interpret their answer," Ake at 1095, in order to effectively confront and cross-examine the State's expert witness. See Barefoot v. Estelle, 463 U.S. 880, (1983). Without this assistance, a defendant's Sixth Amendment right to confront and cross-examine the State's expert witness is meaningless.

This court has repeatedly recognized the fundamental importance of the right to confrontation and cross-examination. In Pointer v. Texas, 380 U.S. 400 (1965), in which the confrontation clause was applied to the states through the Fourteenth Amendment, the court observed:

> There have been few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Pointer v. Texas, 380 U.S. at 405. In Davis v. Alaska, 415 U.S. 308 (1974), the court went further to hold that the right to confrontation means nothing if the defendant is not permitted the tools necessary to conduct an effective cross-examination. It concluded that whenever a defendant is denied the right of effective cross-examination, it is "a constitutional error of the first magnitude and no amount of showing of want of prejudice [will] cure it." Davis v. Alaska, 415 U.S. at 318, quoting from Brookhart v. Janis, 384 U.S. 1, 3 (1965).

The failure of the trial court to provide Tuggle with the means with which he could effectively confront and cross-examine the State's expert witness at sentencing is sufficient, in and of itself, to require the reversal of Tuggle's death sentence. However, the trial court's error reaches even deeper. The purpose of seeking psychiatric assistance in preparation for the sentencing phase of a capital trial is not simply to prepare to rebut evidence the prosecution may offer on the issue of future dangerousness. It is also sought to develop and present evidence in mitigation at sentencing. See §19.2-264.4(b)(ii) and (iv), Code of Virginia, 1950, as amended. When the

trial court denied Tuggle access to the psychiatric assistance he sought, Tuggle was foreclosed of any possibility of presenting any psychiatric evidence in mitigation at sentencing. Because of the limits placed on Tuggle's ability to develop and present mitigating evidence at sentencing, the sentencing procedure in his case lost its constitutional validity. Eddings v. Oklahoma, supra, 455 U.S. at 110-112 (1932); Lockett v. Ohio, supra, 438 U.S. at 601-605 (1978).

Without the assistance of a psychiatric expert at the sentencing phase of Tuggle's trial, the jury did not have before it a sufficiently complete record to allow it to make "an individualized determination [of the appropriate sentence] on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. at 879 (emphasis in the original). The trial court's error in denying Tuggle the assistance he sought rendered the sentencing proceeding unconstitutional and requires his death sentence to be reversed.

II.
INTRODUCTION OF THE TESTIMONY OF DR. CENTOR ON BEHALF OF THE COMMONWEALTH AT THE SENTENCING PHASE OF THE TRIAL VIOLATED LEM TUGGLE'S SIXTH AND FIFTH AMENDMENT RIGHTS

Lem Tuggle was sent to Central State Hospital by court order, for an evaluation of his competency to stand trial and his sanity at the time of the offense. Although the court order specifically stated that the examination was to be limited to these two questions, Arthur Centor, Phd., a clinical psychologist conducting Tuggle's evaluation, expanded his examination to include the issue of future dangerousness, one of two aggravating circumstances the Commonwealth may prove beyond a reasonable doubt at sentencing before the jury can impose the death penalty. §19.2-264.4, Code of Virginia, 1950, as amended. This evaluation was conducted at Centor's own instance, without any instructions to do so from the court or from Tuggle's attorneys, and without any notice to Tuggle's attorneys.

RECEIVED

OCT 13 1983

SMYTH COUNTY GENERAL
DISTRICT COURT
Nancy Munsey, Dep Clerk 4:15 P.M.

MOTION PURSUANT TO
SECTION 19.2-169.1
AND 19.2-169.5

The undersigned Petitioners, Court Appointed Counsel for Lem Davis Tuggle, would herewith move this Court for two evaluations pursuant to the provisions of Sections 19.2-169.1 to determine whether or not the Defendant lacks substantial capacity to understand the proceedings against him and to assist his attorneys in his own defense and pursuant to 19.2-169.5 to determine whether or not at the date of the alleged offense herein the Defendant may have been affected by mental disease or defect and would assign the following reasons:

1. The Defendant has heretofore been confined in the penal system of the Commonwealth of Virginia for a number of years.

2. The undersigned believe, on information, that the said Defendant was the subject of a number of psychological evaluations and other psychological testings during his confinement in the penal system of the Commonwealth of Virginia all of which will be shown by his records contained in his files with the penal system of the Commonwealth of Virginia and would indicate mental illness or disorder.

3. The Defendant has heretofore been evaluated at Southwestern State Hospital, Marion, Virginia for mental defects or disorders in approximately 1971 and the undersigned is not informed of the results of said evaluations.

WHEREFORE the undersigned Petitioners pray that this Court might direct an evaluation of the Defendant, Lem Davis Tuggle, all pursuant to Section 19.2-169.1 of the Code of Virginia and 19.2-169.5 of the Code of Virginia to determine whether or not the Defendant

herein has substantial capacity to understand the proceedings against him and to assist his Attorneys in the defense of his case, and, further to determine whether or not the at the time of the alleged offense the Defendant was suffering any mental disease or defect.

Given under my hand this the 13th day of October 1983.

JOHN H. TATE, JR.,
COURT APPOINTED ATTORNEY

CERTIFICATE

I hereby certify that a true copy of the foregoing was this day delivered unto Danny R. Lowe, Attorney for the Commonwealth, Court House, Marion, Virginia, given under my hand this 13th day October 1983.

JOHN H. TATE, JR.

ORDER

Upon hearing the representations of counsel for Lem Davis Tuggle that the defendant lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the Court finds that there is no probable cause to believe that the defendant lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense.

Upon hearing the representations of counsel for Lem Davis Tuggle that the defendant's actions during the time of the alleged offenses may have been affected by mental disease or defect, the Court finds that there is no probable to believe that the defendant's actions during the time of the alleged offenses may have been affected by mental disease or defect.

The motion of the accused, pursuant to §18.2-67.8 of the Code of Virginia, 1950, as amended, is denied. Such section only applies to Article 7 (Criminal Sexual Assault), Chapter 4 of Title 18.2 and has no application to the charges against Lem Davis Tuggle. No evidence was offered to show that failure to exclude spectators and conduct a closed preliminary hearing would prejudice the accused. 10/14/83 David A. Brown, Judge

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The undersigned, Court appointed attorneys, herewith move this Court to allow unto the attorneys for the Defendant the necessary and reasonable expenses, including expert witness fees and evaluation fees, in order that they may properly represent the Defendant, Lem Davis Tuggle, in the matters now pending before this Court. In support of their petition, the said Court appointed attorneys represent as follows:

I.

The Defendant has been indicted in this Court for the crime of capital murder.

II.

Pursuant to §19.2-163(2) of the Code of Virginia, the Court has the power under the second paragraph thereof as follows: "The Circuit Court shall direct the payment of such reasonable expenses incurred by such Court appointed attorney as it deems appropriate under the circumstances of the case."

In the case at bar, the Attorney for the Commonwealth has had the benefit and availability of a pathologist employed by the State; a dental odontologist; the services of the forensic lab, and the services of a ballistic expert. The attorneys for the Defendant allege and aver to this Court that the Defendant is entitled, under the foregoing section, to have such independent evidence available to him as might be shown by an independent evaluation of the scientific evidence of the Commonwealth and of the evidence existing in this case.

Wherefore, the undersigned prays that this Court order and direct that the attorneys for the Defendant may submit unto this Court estimates of costs and charges for independent pathologist, a forensic serologist, an

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independent ballistics examiner, and an independent odontologist to evaluate the scientific evidence against the Defendant herein.

LEM DAVIS TUGGLE

By Counsel

GWYN, TATE & TATE
Marion, Virginia
Court Appointed Counsel
for Defendant

By Joseph S. Tate

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion was this day mailed unto Danny R. Lowe, Attorney for the Commonwealth, Court House, Marion, Virginia.

Given under my hand this the 3 day of November, 1983.

Joseph S. Tate

Received and filed, this the 3 day of Nov., 19 83
Deputy Clerk

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is matter came on to be heard on the 18th day of November, 1983, before the Honorable J. Aubrey Matthews, Judge of the Circuit Court of Smyth County, Virginia.

THE COURT: Alright, in the case of Commonwealth v. Tuggle, counsel for the defendant has heretofore advised the Court that they desired a hearing on petitions which--to be filed, and the Court fixed today at nine o'clock and the matter was continued until a later time today, and Mr. Tate, how many petitions do you have there?

MR. JOSEPH S. TATE: Your Honor, there's one motion--

THE COURT: Motion.

MR. JOSEPH TATE: --pursuant to Section 19.2-169 and 19.2-169.5, and then there's a petition.

THE COURT: Well, where--where is that, I--

MR. JOSEPH TATE: The petition, Your Honor?

THE COURT: No--

MR. JOSEPH TATE: Or the motion?

THE COURT: --the motion.

MR. JOSEPH TATE: Uh, well, I'm not certain. I have a file copy of it, but I don't--

MR. DANNY R. LOWE: I believe your file copy may be General District Court--I don't believe there's a written, filed in this Court, I've never had a copy of it.

MR. JOSEPH TATE: My--mine says Circuit Court at the top. It may--

THE COURT: Yeah, but it was marked out and--for General District Court.

MR. DANNY LOWE: Is that the one that was delivered to me on

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October the 13th, 1983?

MR. JOSEPH TATE: Yes.

MR. DANNY LOWE: It said General District Court.

THE COURT: And was received October 13th, 1983, in the Smyth County General District Court, Nancy Musser, Deputy Clerk, four-fifteen p.m.

MR. DANNY LOWE: Your Honor, I'm aware of the motion--

THE COURT: Motion, and it's the same motion as--

MR. JOSEPH TATE: Yes, sir. Is--

THE COURT: Alright.

MR. JOSEPH TATE: Yes, sir. It is the motion pursuant to 19.2-169.1 and 19.2-169.5. Yes, sir.

THE COURT: Alright.

MR. JOSEPH TATE: Those are separate. One of them deals with his capacity, potential capacity to understand the proceedings against him, that is 169.1; and 169.5 deals with his condition on the date of the alleged offense.

THE COURT: I understand that. Alright.

MR. JOSEPH TATE: I'd ask Your Honor to treat that motion as our motion for--

THE COURT: I have no problem, I just wanted to make sure that I--and this was my understanding several weeks ago when you and when John Tate requested a hearing.

MR. JOSEPH TATE: Yes, sir.

THE COURT: Alright. Well, first, Mr. Commonwealth, you have any objection to that motion?

MR. DANNY LOWE: On the motion pursuant to having him evaluated as to the--those matters of competency to stand trial

and his condition at the time of the offense. I don't concur in the motion, but I don't oppose the motion.

THE COURT: Alright. Gentlemen, this is a capital murder case and I feel that motion should be granted and that the evaluation be made as requested under 19.2-169.1 and 19.2-169.5, and that motion is granted. Alright, now, then your next--.

MR. JOSEPH TATE: Your Honor, we have filed a petition with the Court requesting the appointment of certain--or allowing us to employ on behalf of the defendant certain expert people to review the evidence--physical evidence which is in the possession of the Commonwealth. I told Commonwealth's Attorney--I would ask the Court to take this petition under advisement at this time. Our position is that this defendant would be entitled to have access to the physical evidence of the Commonwealth for review and for copying, and the Code does not use the term testing but I think that is implied in the spirit of that statute, so that the defendant can develop his own testimony--his own expert witnesses. This defendant is indigent and Your Honor has--or the General District Court--I'm not sure which--has previously made a finding of his indigency, and that right to inspect, photocopy, and test is rendered illusory by his indigency. Were he a similarly situated defendant charged with this offense and financially able to employ experts on his own behalf, he would I think have the right to have this evidence evaluated. As an indigent,

he does not have the funds to do that, and we think that the Fourteenth Amendment to the Constitution of the United States made applicable--equal protection clause of the Constitution of the United States made applicable to the states, demands that he have this right in a real manner, and therefore, we'd ask the Court to authorize us as his attorneys to employ at the expense of the Commonwealth sufficient experts to evaluate the evidence. I might point out that Section 19.2-163, subsection 2, makes provision that for the Circuit Court to direct the payment of such reasonable expenses incurred by such court-appointed attorney as it deems appropriate under the circumstances of the case. I think that gives to Your Honor the discretion and the authority to allow us to employ experts on behalf of the defendant. And we ask that Your Honor do so, and as I've indicated, I would at this point ask Your Honor to take the matter under advisement. And if you'd like for us to submit authorities, we would be willing to do so.

MR. DANNY LOWE: Your Honor, I oppose the motion and I-- clearly the question is a matter of what is a matter of right that this defendant has. And under Rule 3A:14 of the Rules of Court which applies to discovery by the accused, we submit that upon written motion of an accused, the Court shall order the Commonwealth's Attorney to permit the accused to inspect, copy, or photograph any relevant statements, confessions, going

on to written reports of autopsies, ballistic tests, fingerprint analysis, handwriting analysis, blood, urine, breath tests, and other scientific reports, and so on. We submit that the defendant has that right to inspect, copy, or photograph, but that is the extent of the right that he has to--as to access to the evidence that the Commonwealth has in this case whether it's for him or against him. We do submit that if we had any exculpatory evidence that we realize that we have the burden and the duty to give that to the defense. There's been no evidence that we have been withholding any exculpatory evidence. I know of none. The--all the evidence has been made available and we will submit to any order of the Court to produce for inspection, copying, or photographing any evidence, any physical evidence we have in the case, but we state that that's the extent of the right that this accused has whether he has money or does not have money. There is no constitutional right to go beyond that. And that doesn't mean that he would be treated any differently if he was--if he'd had a lot of money and could afford to pay for it all himself. That the right only goes to inspect, copy, etc.

THE COURT: Gentlemen, I see no reason for the Court to take this motion under advisement. I agree with the Attorney for the Commonwealth and will order that defendant and his attorneys be provided by the Attorney for the Commonwealth all matters permitted and directed by the

Rules of the Supreme Court, and I'm sure Commonwealth has no objection to providing that.

MR. DANNY LOWE: No, sir.

THE COURT: Alright. So that will be the order.

MR. JOSEPH TATE: Your Honor, I assume that you are not including in that order the authorization for us to employ independent experts.

THE COURT: I am not.

MR. JOSEPH TATE: Alright, sir. We except to that portion of the ruling.

THE COURT: You may.

MR. JOSEPH TATE: Thank you, Your Honor.

THE COURT: Alright.

THESE ARE ALL THE PROCEEDINGS HAD IN THIS MATTER ON THIS DATE.

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ORDER

THIS DAY came Danny R. Lowe, Esq., Attorney for the Commonwealth; came also the Defendant, Lem DAvis Tuggle, led to the bar in the custody of the Jailer of this Court; came also his Attorney, Joseph S. Tate, Esq., heretofore appointed by the Court.

It appearing to the Court that a motion and petition has heretofore been filed on behalf of the Defendant. Thereupon, the Court proceeded to hear statement of Counsel for the Defendant and the Attorney for the Commonwealth and upon the conclusion thereof is of the opinion to and doth ORDER that the petition be granted to the extent that the Defendant and his attorneys be provided access to such information that may be beneficial in the preparation of his defense on all matters permitted and directed by The Rules of the Supreme Court.

Further, the Court is of the opinion to and doth ORDER that the motion for psychiatric evaluation pursuant to 19.2-169.1 and 19.2-169.5 Code of Virginia of 1950, as Amended is granted.

The Court further ORDERS that the Sheriff of this County transport the Defendant to Central State Hospital, Petersburg, Virginia as required to satisfy said hospital's schedule being established pursuant to this order.

ENTER: THIS THE 18TH DAY OF NOVEMBER, 1983.

J. Aubrey Matthews, Judge

Recorded in C. Law
Order Book No. 33
Page 640

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COMMONWEALTH of VIRGINIA

CENTRAL STATE HOSPITAL
P O. Box 4030
Petersburg, Virginia 23803

DEPARTMENT OF
MENTAL HEALTH AND MENTAL RETARDATION

Telephone (804)-861-7000

December 1, 1983

Honorable J. Aubrey Matthews, Judge
Circuit Court of Smyth County
Marion, Virginia 24354

File

RE: LEM DAVIS TUGGLE
Reg. No. 99058

Dera Judge Matthews:

The above-named individual was ordered to undergo psychiatric evaluation pursuant to Sections 19.2-169.1 and 19.2-169.5 of the Code of Virginia, and was admitted to the Forensic Unit of Central State Hospital on November 22, 1983. He is reported to be charged with capital murder.

On the basis of psychiatric interview, psychiatric evaluation, psychological interview, psychological testing, psychological evaluation, neurological examination, encephalographic examination (EEG), reports of ward behavior, and other available information, we are of the opinion that the above-named defendant is competent to plead and stand trial in that he does not lack substantial capacity to understand the proceedings against him or to assist in his own defense.

We are also of the opinion that the above-named defendant was competent at the time of the alleged crime or crimes in that he was not suffering from a defect of reason due to disease of the mind or defect of the mind and knew the nature, character and consequences of his acts and the difference between right and wrong. Furthermore, we are of the opinion that the above-named defendant was not suffering from a loss of volition due to disease of the mind or defect of the mind at the time of the alleged crime or crimes; he was not suffering from an irresistible impulse.

Because theabove-named defendant is charged with a capital crime, we advised him of his Miranda Rights to have counsel present as well as the other Miranda Rights relative to the substance of our interviews being used at a hearing if he is convicted of capital murder. The defendant waived his Miranda Rights and signed such a waiver. We have formed an opinion as to the issue of the probability of future dangerousness but we are not reporting it to the Court at this time because we were not requested to do so.

RE: LEM DAVIS TUGGLE
Reg. No. 99058

The patient complained of chronic insomnia and we prescribed Halcion 0.5 mgm. at bedtime for those nights he is unable to fall asleep. Continuation of this medication under the supervision of your jail physician and jail medical staff is suggested. As with all incarcerated persons, he should not be allowed to accumulate any pills for a harmful act against himself while he remains in the jail.

If there are any questions, please do not hesitate to contact us through the secretaries at 804/861-7124.

We are requesting this individual be returned to the jurisdiction of your Court at the earliest possible time. Further hospitalizatoin is not indicated.

Yours very truly,

Miller M. Ryans, M. D.
Forensic Psychiatrist

Arthur Centor, Ph. D.
Licensed Clinical Psychologist

cc: Jimmy L. Warren, Clerk
Mr. Danny R. Lowe, Commonwealth Attorney
Mr. Joseph S. Tate, Defense Counsel
Mr. Jerry L. Archer, Sheriff
Jail Physician
Reimbursement Division

AC/MMR/efr

VIRGINIA: IN THE CIRCUIT COURT OF SMYTH COUNTY

COMMONWEALTH OF VIRGINIA

vs. MOTION

LEM DAVIS TUGGLE

TO THE HONORABLE J. AUBREY MATTHEWS, JUDGE OF SAID COURT:

I.

The undersigned court appointed counsel has heretofore filed with this Court a request for fees to provide an independent psychiatric examination of the Defendant herein. The undersigned verily believe that the Defendant, in this case, is entitled to be examined by a psychiatrist or group of psychiatrists chosen by counsel for the Defendant because of the seriousness of the charges heretofore lodged against the Defendant.

II.

The undersigned have made arrangements with Dr. C. Robert Showalter, Blueridge Hospital, Box 100, Charlottesville, Virginia, to perform an evaluation and make unto the attorneys for the Defendant a report on the condition of the Defendant at the time of the alleged offenses herein and at the present time with regard to his capacity to understand the proceedings against him, and to assist in the defense of his trial.

III.

That the undersigned Petitioners verily believe that on previous occasions this Court has directed that prisoners be transported from the Smyth County Jail in Marion, Virginia, to a confinement facility either in

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Albemarle County, Virginia, or the City of Charlottesville for the purpose of evaluations by the said Dr. C. Robert Showalter and his staff at the Institute of Law, Psychiatry and Public Policy which is located at Blueridge Hospital in Charlottesville, Virginia.

Wherefore, the undersigned prays that this Court might enter an order directing the Sheriff of this County to transport the said Lem Davis Tuggle to a confinement facility in either the City of Charlottesville or Albemarle County, Virginia, and to make available the said Defendant for examination by Dr. C. Robert Showalter and the staff of the Institute of Law, Psychiatry and Public Policy located at Blueridge Hospital in Charlottesville, Virginia, in order that the Defendant may have the benefit of an independent psychiatric exmaination and report for the trial of the charges against him.

JOHN H. TATE, JR., AND JOSEPH S. TATE
Court Appointed Counsel

By _____

GUYN, TATE & TATE
Marion, Virginia
Court Appointed Counsel for Defendant

By _____
John H. Tate, Jr.

CERTIFICATE

I hereby certify that a true copy of the foregoing motion was this day delivered unto Danny R. Lowe, Attorney for the Commonwealth, Court House, Marion, Virginia.

Given under my hand this 27th day of December, 1983.

_____
John H. Tate, Jr.

Received and filed, this the 27
day of Dec., 1983.
_____ Deputy Clerk

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This matter came on to be heard on the 3rd day of January, 1984, before the Honorable J. Aubrey Matthews, Judge of the Circuit Court of Smyth County, Virginia.

THE COURT: Alright, for the record, I believe on last Friday we had hearing scheduled in motions filed in Commonwealth v. Tuggle, and on Friday, Mr. Tate for Mr. Tuggle was not able to communicate due to laryngitis or something and we continued it until today, so, gentlemen, you may--.

MR. JOHN H. TATE, JR.: Your Honor, I will argue the motion. Joe Tate still is about unable to speak. He's had laryngitis for about four or five days. Your Honor, we have filed a motion on behalf of the defendant to have him examined by Dr. C. Robert Showalter, who is one of the staff physicians and head of the Law--Institute of Law and Psychiatry at the Blue Ridge Hospital which is associated with the University of Virginia. And the Court will recall that at the time Mr. Tuggle was committed to Central State Hospital in Petersburg, I asked the Court at that time to consider sending him there and filed a motion to--asking that the Court allow to his court-appointed counsel funds to employ an independent psychiatrist to examine Mr. Tuggle. We have available to furnish to Dr. Showalter records of psychiatric examinations of Mr. Tuggle while he was an inmate of the State penal system. We have secured the records of Mr. Tuggle from Southwestern State Hospital when he was committed there in 1971, for psychiatric observation. Dr. Showalter has agreed to examine Mr.

Tuggle and to give to his court-appointed counsel a report. Of course, the Court is well aware of the serious nature of the charges against Mr. Tuggle including the charge of capital murder. And in the defense of this case, it is our belief that Mr. Tuggle is entitled to be examined by a psychiatrist of his choosing in addition to the examination which was provided by a psychiatrist employed by the State at Central State Hospital. I guess it's Eastern State, I'm sorry. Petersburg.

THE COURT: Central.

MR. JOHN TATE: Is it Central? Okay, but we have--we do have the psychiatric records, he has been examined in the penal system, he was examined here at Southwestern State Hospital in 1971, and in a case of this severity and with a charge this severe against the defendant, we have made arrangements to have this done and Dr. Showalter and his associates have agreed to examine him. It would require the transportation of Mr Tuggle to the Charlottesville area for examination by him. I really, you know, I think--I mean, the Court, I think, will recall that I initally asked that he be admitted there--this Court has had reports from this group before, I believe in the Anderson case sometime ago, and they are considered to be experts not only in the field of law and psychiatry but particularly with regard to the examination of a person charged with capital murder. So we would move the Court to permit this independent examination of

'Mr. Tuggle, so that we would have the benefit of that report in representing him.

MR. DANNY R. LOWE: Your Honor, since that's the one motion that's been made to the Court at this time, I'll address on that motion. On November the 19th, 1983, defense counsel in this case moved to have Mr. Tuggle evaluated pursuant to 19.2-169.1 and the Code sections after that, but particularly 19.2-169.5. And just to sum it pretty much up, the position of the Commonwealth, we oppose this motion that they make because 169.1 does state that if at any time after the attorney for the defendant has been retained or appointed and before the end of the trial the Court finds upon hearing evidence or representations of counsel that there's probable cause to believe the defendant lacks the potential capacity to understand the proceedings against him to to assist his attorney in his own defense the Court shall order that a competency evaluation be performed by at least one psychiatrist, clinical psychologist, or master's level psychologist who is qualified by training and experience in forensic evaluation. And the Court did order this and this report has been filed in this Court. That he has been evaluated by a clinical psychologist and by psychiatrist. The whole section on criminal procedure makes no difference in a case of capital murder as to how many places you have to run these people around to and have them evaluated from any other type of case. We have complied with the Code. I didn't oppose the motion to have him evaluated

nder--at that time in November. But it's the position of the Commonwealth that that's as far as the Court has to go until they can find somebody that suits what they want the Court to say, and there's no requirement that they send him around until defense counsel gets a suitable report for them. So I oppose that motion. And all the--his--mainly what we're talking about is his constitutional right to be evaulated and that's been met. So going beyond that is pure benevolence of the Court, and we'd ask that the Court not do it.

MR. JOHN TATE: Your Honor, in response to that, and the file will reflect that at the same time that the motion was filed to commit him in November of 1983, there was filed simultaneously with that motion, a petition to the Court for funds for the defendant to be able to have a psychiatric evaluation. Now, Mr. Tuggle was sent to Central State Hospital and the reports indicate that he was received there on the 22nd day of November, 1983, and the report back to the Court is the 1st day of December, eight days later. And we would say to the Court that the very short time that he was there for evaluation should indicate to the Court that in a State facility with all the patients they have, that in a period of seven days there couldn't have been a great deal of evaluation of Mr. Tuggle and we respectfully request that the Court grant this evaluation and direct his transportation to Charlottesville in order that--we're not fishing for a report, we're asking the Court

exactly what we asked the Court to begin with. To permit us to have an independent evaluation, the Court had denied our petition for funds to do that, and we had now made arrangements individually to have it done.

MR. LOWE: Your Honor, I would like to reply to that by saying that under 19.2-169.5, under (b), location of evaluation, this evaluation could have been performed on an out-patier basis either in a mental health facility or in jail and that's certainly a whole lot less attention than Mr. Tuggle got in this case because Mr. Tuggle was sent to a hospital.

MR. JOHN TATE: Well, Your Honor, in that regard, if Mr. Tuggle were able to make bond and were able to be out on his bond at this point in time, he could go--

THE COURT: Now, wait a minute--wait a minute, Mr. Tate. I--I don't think bond would have been granted in this case, as I know.

MR. JOHN TATE: Well, I mean, there was an original bond fixed by the magistrate--

THE COURT: Well--

MR. JOHN TATE: --when Mr. Tuggle was charged. Had he--

THE COURT: Gentlemen, I--

MR. JOHN TATE: --been able to make that bond, then he would have been free to go to these evaluations.

THE COURT: Gentlemen, I granted your motion for an evaluation and the man has been send and the evaluation made. They took all the time that they require to make that evaluatio I believe in your statement, you indicated that you had

made arrangements and I'm sure that you recognize the fact that Mr. Tuggle cannot be left in Charlottesville or anyplace else. The Sheriff would take him, the Sheriff stay with him, and the Sheriff bring him back. Which means that it would be a matter of just a few hours for an evaluation. I granted the motion for an evaluation because of the seriousness of the case, and any further motion for evaluation, and specifically the motion today, is denied. The matter is scheduled for trial on January 17th, as I recall, I don't have a calendar before me but I believe that is the date fixed for trial.

MR. LOWE: Yes, sir.

THE COURT: Alright. Now, are there any further motions filed?

MR. JOHN TATE: Well, Your Honor, I need to address the Court with regard to the 18th of January. Prior to the time that the Court set this I have a federal jury trial scheduled for the 18th in Abingdon, and if--Your Honor, we have until seven days before the trial to file a motion and I'm advising the Court now we intend to file a motion to change of venue from Smyth County.

MR. LOWE: Your Honor, I believe the motion's already filed, if I recall, because I received a copy already--

MR. JOSEPH TATE: It has been filed.

MR. LOWE: --so I would ask that we have a hearing on that today.

THE COURT: Well, I'm ready to--

MR. LOWE: I'm ready.

THE COURT: Gentlemen, the Court's ruling is as follows. Exhibit Number Thirty-Seven will not be permitted into evidence, it's marked as an exhibit, it's refused. In connection with the merits of this matter, I am of the opinion that specific statements made by the defendant may not be quoted by the doctor, that the doctor may testify in connection with his examination, his conversation, and if he has formed an opinion as to the question at issue, he may testify to it. Alright. Bring them in--

MR. JOHN TATE: Your Honor, may we clarify that with the Court, that his opinion must therefore not be based on the statements which the Court has ruled inadmissible?

MR. LOWE: Your Honor, I'm going to object--

THE COURT: He may not testify as to the statements themselves unless you elicit it, Mr. Tate.

MR. JOHN TATE: Your Honor, we renew our objection that he be permitted to testify at all.

(Thereupon, the Jury returned to open court, and the following proceedings were had.)

THE COURT: You may proceed, gentlemen.

CONTINUED DIRECT EXAMINATION OF DR. CENTOR BY MR. LOWE:

Q. Alright. Dr. Centor, when you were evaluating Mr. Tuggle, did you administer tests to him?

A. I did.

Q. What type of tests did you administer to him?

A. I administered two tests. One is called the Bender Gestalt, that's B-e-n-d-e-r G-e-s-t-a-l-t, which is a test for organisity or brain damage affecting intellectual

functioning. This was administered with a ten second exposure reproduction from memory which is different from the usual administration because it has a higher sensitivity. And on this test he showed no signs of any brain damage affecting intellectual functioning. This was also confirmed by a neurological examination and also by brain wave. I also administered the Rorschach, that's R-o-r-s-c-h-a-c-h, which is commonly known as the ink blot test, and on this test he showed no signs of brain damage affecting intellectual functioning. He showed no signs of any mental disorder or mental disease or montal defect affecting functioning in terms of thinking, his emotions, or his behavior. He showed no signs of any deep depression or mental disorganization. He did, however, show signs of an alternation in his personality between passive behavior and aggressive behavior.

Q. What does that mean?

A. That at times--the indications are that at times he may be quite compliant and he might be well-behaved and he might be a very friendly and socially responsive and at other times he may show--demonstrate--behave in a very aggressive, hostile manner.

Q. Now, are these the tests then you administered to him?

A. Apart from the interview.

Q. Okay. What's the nature of how you go about interviewing him without quoting anything he said now that the Court has stopped us from being able to let you quote, would

you go forward--

MR. JOSEPH TATE: Your Honor, I object to that and ask the Court to declare a mistrial. That's commenting on the Court's rulings.

THE COURT: Overruled, gentlemen, the Court has ruled.

WITNESS: The defendant was interviewed on two separate occasions. The first one was on November the 22nd, 1983, and that was for two hours and twenty-five minutes. And I also interviewed him on December 1st, 1983, for one hour and forty-five minutes--

MR. LOWE:

Q. Were you able--

A. The total time of the interview was four hours and ten minutes.

Q. And a--

A. The testing--excuse me, sir.

Q. Okay, go ahead.

A. The testing took place thirty minutes, that's in additional to that. So the total time that I--interviewing and testing was four hours and forty minutes.

Q. So were you able to devote all that time to discussion with him of the total time of interview and--

A. The interview--the interview related to his past history and various other matters.

Q. Okay. And after you interviewed him and after you did the tests upon him, were you able to make any determination as to what his mental condition was as far as how you would term him as to whether or not you'd be able to form an opinion that--a probability that he would

commit criminal acts of violence that would constitute a continuing serious threat to society?

MR. JOHN TATE: Your Honor, we're going to object to that question. He's--first place, he's combined two questions, he's asked one question that does not relate to this proceeding at all, it relates to a competency determination in the original trial and we believe that the question, secondly, is objectional because it asks the doctor to express an opinion concerning--it's a burden of the Jury in this matter rather than his opinion of the--

THE COURT: Overruled. He may answer.

MR. LOWE:

Q. Could you conclude--

A. There were two issues. One is to his mental competency in term--at the time of the alleged crime occurrence. I did reach an opinion that he was--

Q. Okay--

A. --mentally competent, was not suffering from emotional disorder at the time of the alleged crime or crimes.

Q. Okay. And that was one--

A. The second opinion was--I did reach an opinion as to the probability of future dangerousness and it is my opinion that he shows a high probability of future dangerousness.

Q. That he would commit--there's a high probability he would commit criminal acts of violence that would constitute a continuing--

MR. JOSEPH TATE: We--Your Honor, I object. He's restating the evidence offered in testimony--

MR. LOWE: The statute--

MR. JOSEPH TATE: Your Honor, the Commonwealth's Attorney is not a rookie. He knows the rules and he is violating and flaunting the rules of this Court.

THE COURT: Objection sustained. The doctor's answered the question.

MR. LOWE: Answer any questions defense might have.

CROSS EXAMINATION:

BY JOHN H. TATE, JR.:

Q. Dr. Centor, you are a licensed clinical psychologist?

A. Yes, sir.

Q. And you have given your educational background to the Jury. Did that--does that training include any medical training?

A. There is some overlap in the training that we would receive and that some physicians would receive such as physiology and so on.

Q. But who is Miller M. Ryans?

A. A psychiatrist.

Q. Then Dr. Ryans is a medical doctor specializing in psychiatry?

A. Yes, sir.

Q. Did Dr. Ryans also participate in the evaluation of Mr. Tuggle?

A. Separately, yes, sir. Separately and jointly.

Q. Alright. Were a portion of these interviews that you

INSTRUCTION NO. S-C

The Court instructs the Jury that even if you find, beyond a reasonable doubt, after considering the prior history of the defendant, that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or find beyond a reasonable doubt that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind or aggravated battery to the deceased, then you still are not required to recommend the death sentence, but you are permitted, even under those circumstances to recommend life imprisonment.

EXHIBIT A

pp. 3–4, ¶ IV).
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"break up" the subversive group to which the plaintiff belonged so as to preserve prison order and security. (McFadden Aff. ¶ 43). Finally, defendants stated that the transfer was unrelated to any pending litigation plaintiff might have against the prison. (McFadden Aff. ¶ 44–45).

The affidavit submitted by the defendants does not demonstrate that Chester County officials gave the plaintiff any type of notice or opportunity to be heard prior to his transfer to another institution as required by the Sixth Amendment. *See Cobb v. Aytch*, *supra* at 960. Although it is not clear from plaintiff's complaint that he sustained any damages resulting from a Sixth Amendment violation, the absence of any proof that Chester County officials gave plaintiff an opportunity to be heard prior to the transfer precludes this Court from recommending that the defendants' motion for summary judgment be granted as to this final claim. Nonetheless, for the reasons stated previously, the plaintiff's claim should be dismissed for failure to prosecute.

This result is not harsh in view of the *de minimus* injury alleged by the plaintiff resulting from the stay at Northampton County Prison. It appears from the record that the period of transfer did not preclude plaintiff from preparing for his criminal trial. Plaintiff was released from incarceration on October 18, 1993, and, according to court records, his trial on the robbery charges had not commenced as of April 18, 1994.[9] Plaintiff's Sixth Amendment right to consult with his lawyer and other witnesses could not have been seriously infringed since plaintiff has been free on bail during the past six months. This is sufficient time to consult with counsel and locate and interview potential witnesses.

For all the above reasons, the Court respectfully makes the following:

RECOMMENDATION

AND NOW, this 24th day of MAY, 1994, it is respectfully RECOMMENDED that the defendants' motion to dismiss and for summary judgment be GRANTED as to all claims with the exception of the claims alleged in Civil Action No. 93–4374 relating to plaintiff's transfer to Northampton County Prison. It is recommended that defendants' motion for an injunction be DENIED. It is further recommended that plaintiff's consolidated Civil Action No. 93–3734, (including claims in C.A. No. 93–4374), be DISMISSED with prejudice pursuant to Fed.R.Civ.P. 41(b) for failure to prosecute.

9. According to court records, on May 18, 1993, plaintiff pled *nolo contendere* on the escape charges (No. 280092) and was sentenced on that day. This was before his transfer to Northampton County Prison. Thus, the transfer did not affect plaintiff's Sixth Amendment right to counsel in this case.

Lem Davis TUGGLE, Petitioner,

v.

C.E. THOMPSON, Respondent.

Civ. A. No. 92–0737–R.

United States District Court,
W.D. Virginia,
Roanoke Division.

June 8, 1994.

Following affirmance of capital murder conviction and imposition of death sentence, 228 Va. 493, 323 S.E.2d 539, the United States Supreme Court, 471 U.S. 1096, 105 S.Ct. 2315, 85 L.Ed.2d 835, vacated and remanded. On remand, the Virginia Supreme Court affirmed conviction and sentence, 230 Va. 99, 334 S.E.2d 838. Petition for writ of habeas corpus was filed. The District Court, Turk, J., held that: (1) petitioner was improperly denied assistance of expert witnesses necessary for preparation of his defense; (2) petitioner's right to impartial jury was violated; and (3) "vileness" instruction was constitutionally insufficient.

Petition granted.

1. **Habeas Corpus** ⇐450.1

Federal court should not apply "new rule" to overturn state court's decision that was made at time when outcome was susceptible to debate among reasonable minds; if action is lawful under law existing at time of prisoner's conviction and appeal, no "new rule" is at issue.

2. **Habeas Corpus** ⇐450.1

Where "new rule" was applicable with respect to only one of federal habeas petitioner's claims, he was not required to demonstrate that state judges acted unreasonably or in bad faith with respect to his other claims.

3. **Habeas Corpus** ⇐332.1, 366

Habeas petitioner "exhausted" his claim that denial of expert assistance, solely because of his poverty, violated his Constitutional rights, as that claim was preserved at trial and litigated on merits on appeal; even if petitioner did not raise that claim himself, Virginia Supreme Court had ample opportunity to pass on application of relevant precedent, i.e., *Ake v. Oklahoma*, to case.

4. **Habeas Corpus** ⇐461

New sentencing hearing was required in capital murder prosecution due to constitutional error in denying indigent defendant's motion for independent appointed psychiatrist to rebut Commonwealth psychiatric evidence of future dangerousness; death sentence could not be upheld on ground that jury's finding of "vileness" independently supported death sentence, as it could not be said that evidence presented to jury was unaffected by "future dangerousness" aggravating circumstance stricken by Virginia Supreme Court.

5. **Habeas Corpus** ⇐314

Failure to comply with state procedural rule will result in procedural bar, unless petitioner makes showing of cause and prejudice or actual innocence; this cause and prejudice standard applies to noncompliance with appellate rules, including failure to assign claim as error on appeal.

6. **Habeas Corpus** ⇐401

Habeas petitioner was procedurally barred from raising claim that failure to appoint independent pathologist was constitutional error, as petitioner failed to demonstrate by clear and convincing evidence that, but for failure to appoint independent pathologist, no reasonable juror would have found petitioner eligible for death penalty.

7. **Jury** ⇐33(2.10), 125, 131(4)

Capital murder defendant was deprived of his right to impartial jury, as trial court's refusal to allow defendant's counsel to make any challenges for cause, and extreme restrictions placed on voir dire, resulted in jury containing five individuals who had read articles concerning case, four who had read article that contained false rape information concerning defendant, and three who had been subject to pretrial contacts by media. U.S.C.A. Const.Amends. 6, 8, 14.

8. **Rape** ⇐51(3)

Evidence did not support rape conviction under Virginia law; there was no semen in vagina, and, while there were small bruises found outside vagina, there were no injuries found in vagina and no testimony concerning when bruises occurred. Va.Code 1950, § 18.2–31(e) (1988).

9. **Rape** ⇐7, 51(3)

In Virginia, rape conviction requires evidence that vagina was penetrated by penis; lack of seminal fluid is strong circumstance indicating that there was no penetration.

10. **Criminal Law** ⇐393(1), 641.12(1)

Capital murder defendant was deprived of his rights to counsel and against self-incrimination when state mental health examiner exceeded scope of court's order, as well as defendant's waiver, by evaluating defendant as to "future dangerousness," rather than limiting examination to two issues of competency to stand trial and mental state at time of offense; defendant's waiver could not have been voluntarily, knowingly and intelligently made, as defense counsel had no knowledge of state's intent to trap defendant on "future dangerousness" issue and thus could not advise him on how to deal with that issue, and "waiver" defendant signed was misrepresented to him and concealed from counsel. U.S.C.A. Const.Amends. 5, 6.

11. **Criminal Law** ⇐723(1)

Habeas Corpus ⇐497

Prosecutor's argument that capital murder defendant should be put to death because he would otherwise be released on parole was clear violation of Virginia law, but did not violate defendant's federal constitutional rights.

12. **Habeas Corpus** ⇐453

Violations of state law do not state federal constitutional claim.

13. **Homicide** ⇐311, 343

Reversible error occurred in sentencing phase of capital murder prosecution when court refused defendant's request to provide definitions of "aggravated battery" and "depravity of mind" contained within statutory definition of vileness, and instead instructed jury that it could impose death penalty if defendant's conduct in committing offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to victim beyond minimum necessary to accomplish act of murder. Va.Code 1950, § 19.2–264.4, subd. C.

14. **Criminal Law** ⇐641.12(3)

Capital murder defendant's trial counsel was rendered ineffective by trial court ruling that denied funds for hiring experts to defend. U.S.C.A. Const.Amend. 6.

15. **Criminal Law** ⇐641.13(7)

Capital murder defendant was not prejudiced by his trial counsel's failure to appeal trial court's denial of request for expert pathologist; it did not appear that defendant's right to assistance of independent pathologist was so clear that trial counsel was ineffective in failing to pursue that issue, while choosing instead to pursue 40 other issues and, because it had been almost ten years since offense for which defendant was convicted occurred, it would be impossible to obtain independent pathologist report on rape evidence. U.S.C.A. Const.Amend. 6.

16. **Criminal Law** ⇐1134(3)

Constitutional requirement of meaningful appellate review in capital cases was violated where, upon remand, West Virginia Supreme Court struck "future dangerousness" aggravating factor, leaving only "vileness" aggravator, but then did not compare defendant's case with other capital crimes in which "vileness" aggravator was sole factor. Va.Code 1950, § 17–110.1.

17. **Criminal Law** ⇐1026

Appellate review procedures are critical part of protections that must shape imposition of death penalty.

18. **Habeas Corpus** ⇐450.1

Federal district court entertaining habeas corpus petition does not sit as court of appeals over state Supreme Court.

19. **Habeas Corpus** ⇐500.1

While proportionality of sentences is not cognizable in federal habeas proceeding because Constitution does not require proportionality review, meaningful appellate review is constitutionally required in capital cases.

Helen L. Konrad, Timothy Kaine, Mezzullo & McCandlish, Richmond, VA, for petitioner.

Robert Bartos Condon, Office of the Atty. Gen., Richmond, VA, for respondent.

Memorandum Opinion

TURK, District Judge.

Petitioner Lem Davis Tuggle, through counsel, has filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, Tuggle claims that the following constitutional errors tainted his conviction and sentence:

1) The trial court failed to appoint an independent psychiatrist and an expert pathologist to assist in the preparation of Tuggle's defense;
2) The conduct of the trial court and the prosecution worked to deny Tuggle of his right to a trial by an impartial jury;
3) There was insufficient evidence to convict Tuggle of murder during the commission of rape;

4) The trial court erred in allowing Dr. Arthur Centor to testify that Tuggle posed a "future danger" to society because such testimony was based on discussions with Tuggle outside the presence of counsel without a waiver of his Fifth and Sixth Amendment rights;

5) The prosecutor argued that Tuggle should be put to death because he would otherwise be released on parole;

6) The "vileness" instruction given to the jury was unconstitutionally vague;

7) The trial court prevented Tuggle's appointed trial counsel from rendering effective assistance of counsel to Tuggle at trial because it prohibited them from presenting the kind of defense to which their client was constitutionally entitled;

8) Tuggle's conviction and sentence were so infected with error as to deprive him of the protections provided by the Eighth Amendment;

9) The Virginia Supreme Court upheld Tuggle's death sentence after striking the "future dangerousness" aggravating circumstance;

10) The Virginia death penalty statute is unconstitutional because of the vagueness of the "vileness" aggravating circumstance.

Petitioner requests that the court set aside his conviction and sentence of death.

Respondents, through counsel, filed a motion to dismiss the petition on November 12, 1992. Petitioner, through counsel, responded to the motion on March 12, 1993. Petitioner also filed a separate motion requesting that an evidentiary hearing be held on the motion. A hearing was held on March 15, 1994. After hearing and considering the arguments of counsel on that date, the court finds this case to be ripe for disposition.

1. The Commonwealth also charged petitioner with forcible sodomy and use of a pistol in the commission of murder.

2. Petitioner was also convicted of the non-capital offenses.

Procedural History

Petitioner was charged with capital murder in the Circuit Court of Smyth County in 1983. The Commonwealth alleged that he committed the murder of Jessie Geneva Havens during the commission of rape.[1] Petitioner was represented at trial by two court-appointed counsel: Joseph S. Tate and John H. Tate, Jr. On January 18, 1984, petitioner was convicted of capital murder.[2] On January 19, 1984, the sentencing jury concluded that the crime was vile and that Tuggle posed a future danger. Based on these statutory "aggravating circumstances," the jury recommended a sentence of death. The trial court imposed that sentence on March 22, 1984.

Tuggle appealed his conviction and sentence to the Virginia Supreme Court. On November 30, 1984, that Court, after conducting mandatory sentence review, affirmed the lower court judgment based on the presence of both statutory aggravating circumstances. *Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984).

Petitioner filed a petition for writ of certiorari to the United States Supreme Court. The Supreme Court vacated the sentence and remanded the case to the Virginia Supreme Court in light of its holding in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).[3] *Tuggle v. Virginia*, 471 U.S. 1096, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985).

On remand, the Virginia Supreme Court found that the sentencing was unconstitutional because the prosecution psychiatrist had testified as to petitioner's "future dangerousness," despite the fact that petitioner had been denied the appointment of an independent psychiatrist to help him prepare a defense. *Tuggle v. Commonwealth*, 230 Va. 99, 107–08, 334 S.E.2d 838, 843–44 (1985). Moreover, the Virginia Attorney General conceded that petitioner was entitled to a

3. *Ake* holds that when the prosecution in a capital sentencing proceeding presents psychiatric evidence of an indigent defendant's future dangerousness, due process requires that the defendant have access to psychiatric testimony, a psychiatric examination, and assistance in preparing for the sentencing stage. 470 U.S. at 83–84, 105 S.Ct. at 1096–97.

new sentencing on the basis of *Ake*.[4] Rather than granting a new sentencing, the Virginia Supreme Court struck down the "future danger" aggravating circumstance, but held that the jury's finding of "vileness" independently supported the death sentence. 230 Va. at 111, 334 S.E.2d at 846. The Court did not discuss the effect that the improper psychiatric testimony had on petitioner's sentencing jury, nor did it reconduct a sentence review after the "future dangerousness" aggravator was eliminated.[5] Tuggle petitioned for a rehearing, but his petition was denied on October 11, 1985.[6]

In October 1986, petitioner filed a petition for writ of habeas corpus in the Circuit Court of Smyth County. The court dismissed the petition, without an evidentiary hearing, on March 18, 1991. Petitioner filed a Petition for Appeal in the Virginia Supreme Court which was dismissed by an unpublished order on November 14, 1991. Petitioner then filed a petition for writ of certiorari with the United States Supreme Court which was denied on April 20, 1992. *Tuggle v. Bair*, — U.S. —, 112 S.Ct. 1681, 118 L.Ed.2d 397 (1992). The instant petition is the first Tuggle has filed in federal court.

Factual Background

The offense for which petitioner was convicted occurred on May 29, 1983. The victim was Jessie Geneva Havens. The facts from the original trial court proceeding indicated that petitioner had met Havens at a dance on May 28, 1983 and had offered to give Havens a ride home, which she accepted. When Havens did not return home, the police were notified that she was missing.

The next day, Tuggle volunteered to police that he was connected with a missing persons report relating to Jessie Havens. Tuggle told police that he did not know what had happened to Havens, but he did know where her body was located. The police then went to the place where Tuggle had said Havens body would be and found her partially-clothed body. Petitioner was subsequently charged with murder during the commission of rape, sodomy and use of a firearm to commit murder.

Several months prior to trial, petitioner's trial counsel filed a motion for the appointment of various experts, including a pathologist, a forensic serologist, a ballistics examiner and an odontologist, to examine the scientific evidence on behalf of the defense. The trial court denied petitioner's motion.

Petitioner's trial counsel later filed a motion for the appointment of a mental health professional to examine petitioner's sanity at the time of the offense and his competence to stand trial. The court granted this motion and ordered state mental health professionals to examine petitioner with respect to these two issues. Based on the court's order, the state doctors obtained a waiver from petitioner. The doctors, including Dr. Arthur Centor, interviewed petitioner and informed the court that, in their opinion, petitioner was sane and could assist in his own defense. The state doctors also informed the court that they had formed an opinion as to Tuggle's "future dangerousness."

Fourteen days before trial, Tuggle's counsel was informed of Centor's opinion. They immediately requested the appointment of an independent psychiatrist to assist Tuggle in his defense to the capital murder charge. The trial court denied the request. Trial counsel then offered to pay for such an investigation from their own funds and requested that the court transfer Tuggle to a county jail in the community where their expert was located. The trial court again denied the motion.

Several weeks before trial, Tuggle's trial counsel moved for a change of venue due to the extensive publicity that the case had

4. This is apparently the only instance in Virginia legal history where the Office of the Attorney General has admitted constitutional error in a reported capital case.

5. Respondents contend that the independent review conducted on petitioner's direct appeal was sufficient, because the court expressly affirmed the jury's finding of "vileness." 228 Va. at 517, 323 S.E.2d at 554.

6. Petitioner filed another petition for writ of certiorari attacking this ruling, but the petition was denied. *Tuggle v. Virginia*, 478 U.S. 1010, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986).

received in the months leading up to trial. Some of the publicity reported that petitioner had previously been convicted of second-degree murder and at least one article mistakenly indicated that the prior conviction also included rape. Another article repeated this information and also indicated that Tuggle was a suspect in the rape of a 15 year-old girl for which he was never charged. The trial court denied the motion, but conditioned the denial on the ability to select an unbiased jury during voir dire.

The jury panel in petitioner's case was chosen from a venire that had previously been called for duty in other cases during the same month. On the night before the trial, John Tate learned from a call from a potential juror that some members of the panel from which the Tuggle jury was selected had been contacted by a member of the Sheriff's Department and by Terry Hawthorne, a reporter for the *Smyth County News*, apparently concerning their performance as jurors in a murder trial that had occurred a few days earlier. In that trial, the defendant had been convicted of a lesser crime than the first-degree murder charge and the prosecutor had expressed his dissatisfaction with the jury verdict to a local reporter. Tate refused to discuss the matter with the juror.

The next day, however, Tuggle's counsel revealed to the trial court that some members of the jury venire had been contacted concerning their service on the previous jury. Counsel asked for the opportunity to voir dire the jury about such contacts or to summon the reporter who had contacted members of the venire for questioning. The trial court denied both requests. Tuggle's counsel also sought the opportunity to voir dire members of the jury panel individually about pretrial publicity, so as to explore the effects of such publicity without infecting other potential jurors with bias. The trial court again denied counsel's request.

When the first twenty members of the panel were called for voir dire, eight panel members—in the presence of the other panel members—immediately indicated that they had formed an opinion as to petitioner's guilt. These eight panel members were excused. However, of the twenty member panel from which Tuggle's trial jury was ultimately chosen, five members indicated that they had been contacted before trial by either a member of the Sheriff's Department or by a representative of the local media, ten members indicated that they had read articles about the Tuggle case (including those that referred to a prior homicide and that contained the false report about a previous rape conviction), six acknowledged that they remembered details from the newspaper accounts, and five had served as jurors in the earlier trial and had been contacted by the media or Sheriff's Department to explain their lenient verdict in that case. The court refused to allow individualized voir dire of these jurors.

After general questioning of the jury panel was complete, the trial court declared the panel qualified and told Tuggle's counsel to commence their peremptory strikes. Tuggle's counsel asked for the opportunity to challenge jurors for cause, but the trial court refused to hear any challenges for cause.

On the afternoon of the first day of trial, petitioner's counsel received a copy of the *Smyth County News* of that day, confirming that a number of the jurors who were sitting on Tuggle's jury had been contacted by the paper and asked to explain how they had arrived at a verdict in the murder case which had been tried a few days earlier. One of the jurors sitting on the Tuggle case, Robert Brown, was quoted expressing his disapproval of the decision of the other jurors in the previous case because it was too lenient on the defendant. Brown was later selected to be foreman of the Tuggle jury. Petitioner's counsel moved for a mistrial because of the prejudicial media contact, but the motion was denied.

During the trial, the Commonwealth introduced expert testimony from its pathologist on the rape evidence. The pathologist testified that the victim had been sodomized and had died of a single gunshot wound to the chest. The pathologist further testified that the victim's vagina had been "penetrated or manipulated." However, he acknowledged that no semen was found in the victim's vagina. Nevertheless, because the trial court had denied Tuggle's motion for an expert on the subject, the defense was unable to put on affirmative evidence challenging the rape charge. The jury convicted petitioner of murder during the commission of rape.

During the sentencing phase of petitioner's trial, the prosecution called Dr. Arthur Centor to testify about Tuggle's future dangerousness. Trial counsel objected, but the court overruled the objection and Centor was permitted to testify that Tuggle showed a "high probability of future dangerousness." Because petitioner had been denied the assistance of an independent psychiatric expert, he could not offer evidence to counter the professional testimony of Dr. Centor.

In instructing the jury on the "vileness" aggravating circumstance, the trial court refused Tuggle's request to provide definitions of the terms contained within the statutory definition of vileness. *See* Va.Code § 19.2-264.4(C). The trial court, tracking the language of the statute, simply instructed the jury that it could impose the death penalty if Tuggle's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." *Id.*

In closing argument at the sentencing phase of the trial, the Smyth County prosecutor argued to the jury that Tuggle should receive the death penalty so he would not get out of prison on parole. The prosecutor also stressed the testimony of Dr. Centor that Tuggle posed a future danger to society. The jury found that the Commonwealth had proved both the "future dangerousness" and "vileness" predicates beyond a reasonable doubt and responded with a sentence of death.

Analysis

Respondents have raised two grounds for dismissal of Tuggle's petition. First, respondents argue that state judges have considered his claims and their rulings were not "unreasonable." Second, the Commonwealth addresses the merits of Tuggle's claims. The respondents' arguments will be addressed in turn.

I. *The Respondents' First Ground for Dismissal*

The respondents first argue that Tuggle's claims must be dismissed due to the "reasonableness" doctrine announced by the United States Supreme Court in *Butler v. McKellar*, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990), and its progeny. Citing *Butler* and *Bunch v. Thompson*, 949 F.2d 1354 (4th Cir. 1991), *cert. denied*, — U.S. —, 112 S.Ct. 3056, 120 L.Ed.2d 922 (1992), the Commonwealth argues that this court "must defer to the rulings of the Virginia Supreme Court on the merits of Tuggle's claims ... *unless* it can be said that the state court's rulings were not reasonable good-faith interpretations of existing precedent." However, respondents' reliance on these cases is misplaced.

[1] *Bunch* and *Butler* stand only for the proposition that a federal court should not apply a "new rule" to overturn a state court's decision which was made at a time when the outcome was "susceptible to debate among reasonable minds." *Butler*, 494 U.S. at 415, 110 S.Ct. at 1217-18; *see Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (announcing the "new rule" doctrine in habeas corpus cases). The concern in these cases is to avoid retroactive application of a "new rule" after a court has rendered a decision based on existing law. *See Teague*, *supra*. If an action is lawful under the law existing at the time of a prisoner's conviction and appeal, no "new rule" is at issue.

[2] In this case, the Commonwealth argues that the "new rule" is applicable with respect to only one claim. Therefore, the holdings of *Bunch* and *Butler* are clearly inapplicable to the other claims and respondents' argument would require petitioner to demonstrate that state judges acted "unreasonably" or in bad faith. Such proof has never been required of a habeas petitioner and this court declines to require such proof now. The respondents' motion to dismiss on this basis will accordingly be denied.

II. *The Merits of Petitioner's Claims*

1) *Tuggle was Improperly Denied the Assistance of Expert Witnesses Necessary for the Preparation of His Defense.*

Petitioner first argues that he was denied the assistance of expert witnesses in violation

of his constitutional rights. Petitioner contends that the trial court's refusal to appoint an independent pathologist and psychiatrist to assist him in his defense constitute independent constitutional violations of petitioner's Fifth, Eighth and Fourteenth Amendment rights. Petitioner argues that these two failures deprived him of due process and equal protection of the law.

Petitioner was appointed counsel to defend his capital charge of murder during the commission of rape because of his poverty. Arrayed against him were a forensic pathologist, two dentists (including a forensic odontologist),[7] and a licensed clinical psychologist. However, all of petitioner's requests for expert assistance to rebut the charges against him were denied.[8] At trial, Tuggle appeared without any expert assistance. His counsel did not even have the benefit of consultation with experts to assist in their examination of the state's key witnesses. Nevertheless, petitioner argues that the court's failures to appoint an independent pathologist and psychiatrist were the most egregious violations because his capital murder conviction hinged on the existence of a rape and the rape evidence was equivocal and because he was unable to rebut the state doctor's evidence as to his "future dangerousness."[9]

Petitioner contends that the extent to which the expert testimony was relied upon by both the trial jury and the appellate courts is evidenced by the decision of the Virginia Supreme Court in its affirmance of Tuggle's conviction and sentence. *Tuggle v. Commonwealth*, 228 Va. 493, 501–2, 511, 513, 517, 323 S.E.2d 539 (1984). Moreover, petitioner asserts that the trial court's denials "rendered his conviction and death sentence inherently unreliable." In fact, petitioner asserts that courts have long recognized that a defendant "may be at an unfair disadvantage if he is unable because of poverty to parry by his own witnesses the thrust of those against him." *Reilly v. Berry*, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929). Petitioner stresses that the denial of expert assistance in this case, solely because of his poverty, violated his constitutional rights.

1. *The Psychiatrist Issue*

a. *The Exhaustion Requirement*

[3] Petitioner contends that this issue has been exhausted because it was preserved at trial and litigated on the merits on appeal. Although respondents contend that the claim is not exhausted because petitioner did not raise the claim himself, it is clear that the Virginia Supreme Court had ample opportunity to pass on the application of *Ake* to this case and, therefore, the claim is exhausted. *See Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) (purpose of exhaustion requirement is to ensure that state courts have first opportunity to review federal constitutional challenges to state convictions).

b. *The Substantive Claim*

[4] Tuggle's counsel sought the appointment of an independent psychiatrist. When they were rebuffed, they sought leave of court to transfer petitioner to another jail to facilitate a psychiatric examination that they would fund themselves. The trial court again refused. The refusal of the trial court to grant the assistance of a psychiatrist was affirmed by the Virginia Supreme Court on direct appeal. *Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984). That ruling was vacated by the United States Supreme Court in light of the holding of *Ake v. Oklahoma, supra*. *Tuggle v. Virginia*, 471 U.S. 1096, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985). *Ake* held, *inter alia*, that when the prosecution in a capital murder proceeding presents psychiatric evidence of an indigent defendant's future dangerousness, due process requires that the state provide the defendant with the assistance of a psychiatric expert. 470 U.S. at 83–84, 105 S.Ct. at 1096. The case was remanded to the Virginia Supreme Court for reconsideration precisely because Tuggle had been denied the assistance of a psychiatric expert.

On remand, the Virginia Attorney General conceded that the failure to appoint a psychiatrist to assist Tuggle's defense was unconstitutional and that a new sentencing hearing was required. *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838 (1985). The Virginia Supreme Court agreed that Tuggle's sentencing was infected with constitutional error, but rejected the position of both litigants that a new sentencing was needed. Instead, the Virginia Supreme Court found as follows:

> When a jury makes separate findings of specific statutory aggravating circumstances, any one of which could support a sentence of death, and one of the circumstances subsequently is invalidated, the remaining valid circumstance, or circumstances, will support the sentence. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).... In *Tuggle*, the jury made a separate, specific finding that the "vileness" predicate had been proved beyond a reasonable doubt. Although *Ake* requires the conclusion that the trial court erred in denying Tuggle an independent psychiatrist once the Commonwealth had submitted psychiatric evidence on the issue of future dangerousness, we hold, nonetheless, that the error neither impairs nor invalidates the jury's finding of vileness.

230 Va. at 111, 334 S.E.2d 838. Petitioner contends that this ruling was in error because, *inter alia*, it ignored the fact that the sentencing jury heard unconstitutional evidence which it was able to consider in its deliberations.

Respondents reply that the Virginia Supreme Court's decision to uphold the death sentence on the "vileness" ground was consistent with the decisions of the Fourth Circuit interpreting and applying the rule in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *See Clanton v. Muncy*, 845 F.2d 1238, 1243 (4th Cir.), *cert. denied*, 485 U.S. 1000, 108 S.Ct. 1459, 99 L.Ed.2d 690 (1988); *J. Briley v. Bass*, 750 F.2d 1238, 1245 (4th Cir.1984), *cert. denied*, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985); *Briley v. Bass*, 742 F.2d 155, 165–66 (4th Cir.1984), *cert. denied*, 469 U.S. 893, 105 S.Ct. 270, 83 L.Ed.2d 206 (1984). Again, respondents reliance on these cases is misplaced.

In *Zant*, the jury had found three aggravating factors present to support its sentence of death. On direct appeal, the state supreme court struck one of the aggravating circumstances as unconstitutionally vague, but upheld the death sentence on the ground that the other two aggravating circumstances were sufficient bases for the imposition of the death penalty. The United States Supreme Court concluded that, even though the jury had been instructed on, and found, an unconstitutional aggravating circumstance, all the evidence it considered was properly related to the two valid aggravating circumstances. Thus, the Court found that the jury's deliberation had not been overly affected by the improper aggravating circumstance instruction. The Court recognized, however, that "if an invalid statutory aggravating circumstance were supported by material evidence not properly before the jury, a different case would be presented." 462 U.S. at 887, n. 24, 103 S.Ct. at 2748, n. 24.

In this case, it cannot be said that the evidence presented to the jury was unaffected by the "future dangerousness" aggravating circumstance stricken by the Virginia Supreme Court. Because the state tried Tuggle on the "future dangerousness" aggravator, the jury *did hear* psychological testimony that Tuggle posed a serious threat to society. And, because the state committed the constitutional error of not granting Tuggle's request for psychiatric assistance, the jury *did not hear* testimony from Tuggle to rebut the future dangerousness claim. Thus, unlike *Zant*, the material presented to the Tuggle sentencing jury was seriously skewed because of the constitutional error.[10]

Instead, this case is similar to *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100

7. One of the dentists, Alvin Kagey, was paid $2200 by the court for his testimony.

8. In addition to the trial court's denial of an independent pathologist and psychiatrist, petitioner was also denied the requested assistance of a serologist, a ballistics expert and an odontologist.

9. Petitioner also argues that the refusal to permit him to obtain an independent psychiatric examination deprived him of the ability to develop evidence to use as mitigation during sentencing, specifically the fact that there was a history of mental illness in petitioner's family, that petitioner was hospitalized in a near-coma as an infant, and that, as a young child, petitioner suffered a closed head wound in a fall that rendered him unconscious.

10. The Fourth Circuit cases relied upon by respondents are distinguishable from Tuggle's case

L.Ed.2d 575 (1988). In *Johnson*, a capital defendant was sentenced to death after a jury found three statutory aggravating circumstances, including that the petitioner had been previously convicted of another felony involving violence. The Supreme Court vacated the death sentence because the previous felony relied upon in establishing one aggravating circumstance was an uncounseled conviction, obtained in violation of the constitution. The state attempted to justify affirmation of the death sentence using the same *Zant v. Stephens* argument made by the Commonwealth in this case, namely that there were other valid aggravating circumstances that would independently support the sentence. The Supreme Court unanimously rejected the argument, however, finding that the error "extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." 486 U.S. at 590, 108 S.Ct. at 1989.

In Tuggle's case, the *Ake* violation put improper and highly prejudicial material before his sentencing jury. The Commonwealth cites *no* case in which a court has found that an *Ake* violation was cured because there were other statutory aggravating circumstances. This fact is explained because an *Ake* violation cannot be cured by a mere review of the record. The violation, by depriving a defendant of needed assistance, thwarts his very ability to make a record on a critical point or even to rebut the evidence marshalled against him. Therefore, the court finds that the petition must be granted on this ground.

2. *The Pathologist Issue*

a. *The Exhaustion Requirement*

Petitioner contends that this claim is exhausted because it was presented to the Virginia Supreme Court in his state habeas action. Although respondents acknowledge that the claim was raised in state habeas, they contend that the claim is procedurally barred because petitioner failed to raise the claim on direct appeal. Moreover, respondents point out that the Virginia Supreme Court expressly found the claim to be barred under Virginia's procedural default doctrine. *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d 804 (1975). The court has reviewed the record and has determined that respondents' assertions are correct.

[5] It is well-settled that failure to comply with a state procedural rule will result in a procedural bar, unless the petitioner makes a showing of cause and prejudice or actual innocence. *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). The cause and prejudice standard applies to noncompliance with appellate rules, including the failure to assign a claim as error on appeal. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). In this case, petitioner contends that the cause for his default was his trial attorney's ineffective assistance of counsel at trial. Because attorney error short of constitutional ineffectiveness does not constitute cause, *Carrier*, 477 U.S. at 487–88, 106 S.Ct. at 2644–45, the determination that there is cause for the default necessarily requires a determination that petitioner's attorney was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Therefore, this claim will be addressed in petitioner's ineffective assistance of counsel claim (Claim 7).

[6] As to the actual innocence prong, the court views the failure to appoint an independent pathologist as just one example of the

in the same fashion as *Zant*. While the petitioners in each case challenged the validity of the "vileness" aggravating circumstance found by the trial juries, no improper evidence was admitted in support of the challenged circumstance. In fact, evidence as to "vileness" was properly before the juries because of evidence admitted during the guilt phase of their trials. These cases do not resolve the issue, explicitly raised in *Zant*, of how to analyze a death sentence supported by an unconstitutional aggravator for which evidence was improperly admitted. *See J. Briley v. Bass*, 750 F.2d 1238, 1245 n. 12 (4th Cir.1984) (pointing out that *Zant* result inapplicable if "invalid aggravating circumstance were supported by material evidence improperly before the jury").

trial court's extreme willingness to side-step petitioner's constitutional rights to ensure a conviction. However, by itself, petitioner has failed to demonstrate by clear and convincing evidence that but for the failure to appoint an independent pathologist, no reasonable juror would have found petitioner eligible for the death penalty. *Sawyer v. Whitley*, — U.S. —, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Consequently, the court finds that the actual innocence prong is not met and the bar cannot be removed on this basis. *See Harris v. Reed, supra.*

2) *Tuggle's right to a trial by an impartial jury was violated by the conduct of the trial court and the prosecution.*

[7] Petitioner contends that his right to a trial by an impartial jury was violated by, *inter alia*, pre-trial publicity, the failure of the trial court to grant a change of venue, contact of the jurors before the trial by the media and law enforcement officials, the trial court's failure to allow adequate voir dire concerning the jurors' exposure to publicity or other contacts, and the trial court's refusal to allow challenges for cause.

The charge against Tuggle was notorious in Smyth County, a rural county in southwest Virginia.[11] The case provoked an outpouring of articles before trial. A number of the articles discussed the fact that petitioner had been convicted of a prior murder and a few contained the false report that the murder also involved a rape. Other articles mentioned that Tuggle was a suspect in the rape of a teenage girl for which he was never charged. Based on the extensive pretrial publicity, Tuggle moved for a change of venue. The trial court refused to grant the motion, but stated that it would consider the motion again if it was clear at trial that an impartial jury could not be found.

When the jury was impanelled, eight members of the panel had to be dismissed in the presence of the remaining panel members because they indicated that they had already formed an impression as to Tuggle's guilt. Of the twenty remaining panel members, half indicated that they had read newspaper articles about Tuggle's prior conviction, six acknowledged that they remembered details from the articles, and five had served as jurors in the earlier murder trial and had been contacted by the media or the Sheriff's Department to explain their lenient verdict.[12] However, despite these facts, the court refused individualized voir dire[13] and only allowed trial counsel to ask whether a juror was subject to bias as a result of anything he or she had read.[14]

At the close of voir dire, the judge declared the panel qualified and refused to allow Tuggle's counsel to make any challenges for cause.[15] The extreme restrictions on voir dire left defense counsel bereft of critical information needed to exercise peremptory challenges. Consequently, the jury that ultimately heard the case contained five individuals who had read articles concerning the case, four who had read the article that contained the false rape information, and three who had been subject to pretrial contacts.

Petitioner contends that each of these errors, separately and in combination, deprived him of his right to an impartial jury in violation of his Sixth, Eighth and Fourteenth Amendment rights. Petitioner claims that

11. Even today, almost nine years after the trial, a framed copy of Tuggle's death warrant is on display on the wall of the Circuit Court Record Room. No orders or pleadings from any other case in Smyth County history are displayed publicly in the courthouse.

12. Petitioner contends that this contact was encouraged by the prosecutor because he was so dissatisfied with the jury's verdict in the earlier murder trial.

13. Petitioner contends that the trial court's refusal to allow questioning about knowledge of newspaper articles outside the presence of the other panel members prevented defense counsel from exploring the effects of pre-trial publicity on the jury panel without exposing the other members of the panel to the prejudicial information.

14. Petitioner contends that the limitations on voir dire were in violation of Va.Code § 8.01-358.

15. The Virginia Supreme Court acknowledged that such refusal was error. *Tuggle v. Commonwealth*, 228 Va. at 505–06, 323 S.E.2d 539.

these issues have all been exhausted because they were raised at trial and presented to the Virginia Supreme Court.[16]

The pretrial influences on Tuggle's jury and the trial court's restriction upon counsel's efforts to discern them bear great similarity to many cases in which courts have found that a defendant's right to an impartial jury has been abrogated. In the area of improper contact with jurors, the Fourth Circuit reversed a capital sentence due to a comment made by a third party to a juror during the course of trial. *Stockton v. Virginia*, 852 F.2d 740 (4th Cir.1988) (during criminal trial, any private communication by outsider with juror is presumptively prejudicial), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). In this case, the contacts of media with members of Tuggle's jury were improper.

As to petitioner's voir dire claim, the United States Supreme Court has held that adequate voir dire is part of a defendant's Sixth Amendment right to an impartial jury. *Morgan v. Illinois*, — U.S. —, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1991). The Fourth Circuit has also recognized that a trial court abuses its discretion if its limitation of voir dire hinders "defendant's opportunity to make reasonable use of his challenges." *United States v. Brown*, 799 F.2d 134, 136 (4th Cir. 1986). The constitutional entitlement to adequate voir dire is particularly critical in a capital murder trial. *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). Although a capital defendant is not automatically entitled to individualized voir dire on pre-trial publicity, such voir dire might be necessitated where a significant number of panel members indicated a pre-existing opinion about the case and where the crime occurred in a rural area. *Mu'Min v. Virginia*, 500 U.S. 415, 427–32, 111 S.Ct. 1899, 1907–08, 114 L.Ed.2d 493 (1991).

Not only are the factors discussed in *Mu'Min* present in this case, but the complete failure of the trial court to allow any challenges for cause deprived Tuggle of the normal protections inherent in the jury selection process. The complete failure of the trial court to allow sufficient inquiry prevented Tuggle's counsel from protecting Tuggle's right to an impartial jury. The failures were particularly notable because this was a capital murder trial. Such errors violated Tuggle's Sixth, Eighth and Fourteenth Amendment rights.

Although respondents contend that the allegations petitioner raises in this claim all involve the propriety of determinations made by the trial judge which should be "reviewed for abuse of discretion only," *see, e.g., United States v. Smith*, 918 F.2d 1551 (11th Cir. 1990), it is clear that such abuse of discretion is present in this case. The court will grant the petitioner's petition for writ of habeas corpus on this basis.

3) *There was insufficient evidence to convict Tuggle of murder during the commission of rape.*[17]

The capital murder charge for which Tuggle was convicted was murder during or subsequent to the rape of the victim. Va.Code § 18.2–31(e). Had the murder been unaccompanied with a rape charge, it would not have been capital murder in Virginia. Thus, the element of rape was critical to this case. Petitioner contends that the evidence in the case was insufficient to warrant a conviction for rape.

16. Petitioner acknowledges that the Virginia Supreme Court held that any claim of prosecutorial misconduct was procedurally barred because it was not raised at trial or on direct appeal. However, petitioner contends that this is not a bar because the procedural default rule applies only to claims for which there was a "full and fair opportunity" to have a hearing at trial. *Slayton*, 215 Va. at 29, 205 S.E.2d 680. In this case, the trial court's refusal to allow any voir dire on the subject and refusal to summons the reporter who made the contact left the defense unable to discover at trial the prosecution's role in encouraging the jury contact. Thus, there is no procedural bar. *See DiPaola v. Riddle*, 581 F.2d 1111, 1113–14 (4th Cir.1978), *cert. denied*, 440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455 (1979).

17. This claim has indisputably been exhausted through presentation to the Virginia Supreme Court on direct appeal.

Although petitioner acknowledges that semen was found in the victim's rectum, no seminal fluid was found in or around the vagina.[18] There was a small bruise at the entrance to the vagina, but there was no testimony concerning when the bruise occurred. The state's pathologist, Dr. Oxley, said that the bruise was consistent with penetration by "something, a penis, a finger, an object, something."[19]

[8, 9] In Virginia, a rape conviction requires evidence that the vagina was penetrated by the penis. The lack of seminal fluid is a strong circumstance indicating that there was no penetration. *McCall v. Commonwealth*, 192 Va. 422, 65 S.E.2d 540 (1951); *Coles v. Peyton*, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968). The Virginia Supreme Court has, in non-capital cases, reversed rape convictions even where they involve vaginal injury and unequivocal expert testimony that penetration of the vagina by a penis had occurred. *Strawderman v. Commonwealth*, 200 Va. 855, 108 S.E.2d 376 (1959) (finding it to be "common knowledge" that vaginal injuries could have been caused by means other than penetration, such as fondling).

Petitioner argues that, given the lack of seminal fluid in or around the vagina and the lack of any injury or bruise in the vagina, there was insufficient evidence to convict Tuggle of rape. Petitioner contends that this claim is particularly critical given the trial court's refusal to allow the appointment of an independent pathologist to help Tuggle defend against the rape charge. Petitioner finally contends that, given the scant evidence of rape, there is a strong likelihood that defense counsel, with the assistance of an independent pathologist, could have successfully defended the rape charge.

Respondents, on the other hand, assert that reasonable jurists could and did find sufficient evidence to conclude that a rape occurred in this case. Respondents argue that under *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791–92, 61 L.Ed.2d 560 (1979), a federal habeas applicant is entitled to relief only if it is found upon a review of the record evidence adduced at trial, in the light most favorable to the prosecution, that no rational trier of fact could have found guilt beyond a reasonable doubt. Respondents argue that the Virginia Supreme Court's judgment that the evidence was sufficient is "entitled to deference, by this court." *Id.* at 322, 99 S.Ct. at 2790–91; *see* 42 U.S.C. § 2254(d).[20]

Even apart from Tuggle's inability to produce his own trial evidence due to the denial of expert assistance, the evidence that was produced cannot show guilt beyond a reasonable doubt under the elements of the crime of rape as defined and applied by the Virginia courts. In this case, there was no semen in the vagina. There were small bruises found *outside* the vagina, but there were no injuries found in the vagina and there was no testimony concerning when the bruises occurred. The state pathologist testified that the bruises could have been caused by penetration of "something, a penis, a finger, an object, something." With such evidence, no rational fact-finder could have found proof beyond a reasonable doubt. That the jury found rape in this case is most likely explained by the inaccurate pre-trial information concerning other rapes supposedly committed by Tuggle, as well as the public pressure surrounding this notorious case, which was heightened by press contacts with jurors, prior to trial. The court grants the petitioner's petition for habeas relief on this ground.

18. At the time Tuggle was tried, homicide accompanied by sodomy was not a capital crime in Virginia.

19. At the preliminary hearing, the state examiner had testified that the bruise was equally consistent with penetration or manipulation.

20. The Virginia Supreme Court held that the evidence was uncontroverted that petitioner had exposed his penis and that the victim's vagina had been penetrated by "something." Moreover, the Court noted that "no evidence in the present case reasonably suggests penetration of the victim's vagina by an object other than the defendant's penis." 228 Va. at 511, 323 S.E.2d at 550. Accordingly, the Court held that "the evidence supports the jury's finding of forcible sexual intercourse." 228 Va. at 512, 323 S.E.2d at 550 (citations omitted).

4) The trial court erred in allowing Dr. Arthur Centor to testify that Tuggle posed a "future danger" to society because such testimony was based on discussions with Tuggle outside the presence of counsel without a waiver of his Fifth and Sixth Amendment rights.

[10] Petitioner next contends that the state mental health examiner exceeded the scope of the court's order, as well as petitioner's waiver, when it examined him as to "future dangerousness," rather than limiting the examination to the two issues of competency to stand trial and mental state at the time of the offense.[21] Petitioner contends that, prior to trial, his trial counsel had clarified with the Commonwealth's Attorney and the staff at the hospital that, in accordance with Va.Code § 19.2–169.7, nothing Tuggle said would be used against him at trial unless he elected to assert an insanity defense. Based on the Virginia Code provision and on the conversation with the Attorney General's office, his counsel advised him to cooperate with the evaluation.

Petitioner alleges that, either independently or at the urging of the prosecution, Dr. Centor expanded his evaluation of Tuggle to include the issue of whether he posed a future danger to society.[22] No notice of this intent was provided to Tuggle's counsel, nor did Centor explain to Tuggle that he was expanding his examination into a new topic area not disclosed to counsel. However, Centor did ask Tuggle to sign a waiver form and Tuggle complied.[23]

After conducting the evaluation, Centor informed the Commonwealth's Attorney that he had developed an opinion concerning Tuggle's future dangerousness. Despite the fact that Tuggle did not defend the case based on his mental state, the prosecutor called Centor and he was permitted to testify at trial that there was a high probability that Tuggle would commit criminal acts of violence in the future. In his closing sentencing argument, the Commonwealth's Attorney relied heavily on Centor's testimony. In addition, the Virginia Supreme Court relied on the testimony in upholding Tuggle's death sentence.

Petitioner contends that the testimony of Dr. Centor violated the trial court's order, Virginia law and the agreement between defense counsel and the prosecution. Petitioner further contends that the illegal testimony of Dr. Centor was particularly damaging to him because he was unable to effectively cross-examine Dr. Centor on his testimony, because he was denied the assistance of an independent psychiatrist to present a defense to the "future dangerousness" aggravator or to develop mitigating evidence to counter the prosecution's sentencing evidence.

Respondents contend that, prior to his examination, petitioner was fully apprised of his rights, he understood his rights, and that he signed a rights waiver form. Respondents argue that the Virginia Supreme Court found that Tuggle's waiver was done voluntarily, knowingly and intelligently. 228 Va. at 514, 323 S.E.2d at 551–52. Respondents assert that this finding of fact is entitled to a presumption of correctness by this court. *See* 28 U.S.C.A. § 2254(d).

In *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), a defendant in a capital case was sent by the court for an examination of his mental competency. Although no competency defense was raised at trial, the psychiatrist took the stand in the sentencing phase to testify that the defendant represented a danger to society. The Supreme Court reversed the sentence and found that the testimony was obtained in violation of Smith's Fifth and Sixth Amendment rights. Smith's Fifth Amendment rights were violated because he received no clear warning that his statements to the state

21. This claim is exhausted because it was presented to the Virginia Supreme Court in the direct appeal of Tuggle's case.

22. Petitioner contends that this action was taken without court order and without advising Tuggle's trial counsel that such an evaluation was being made. Petitioner further contends that, had trial counsel known such an evaluation was going to be made, they would have advised Tuggle not to cooperate with such an evaluation.

23. Petitioner argues that the waiver form appeared innocuous because Tuggle had been informed by his lawyers that he would be waiving his Fifth Amendment rights only if he put his mental state in issue at trial.

medical examiner could be used against him. His Sixth Amendment right to counsel was violated because his defense counsel had not been informed of the investigation. As the Supreme Court found:

> Defense counsel ... were not notified in advance that the psychiatric investigation would encompass the issue of their client's future dangerousness, and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.

451 U.S. at 471, 101 S.Ct. at 1877.[24]

However, the facts of *Estelle v. Smith* are not significantly different from this case and its ruling is equally applicable to the instant case. While Tuggle's counsel were aware of the examination, it had been expressly limited to issues other than future dangerousness. Under state law, statements made by Tuggle in the examination would be admissible *if* he put his mental state in issue. But, the same law (as well as the state's agreement) made clear such statements could not be used against Tuggle if his mental state was not used as a defense. Va.Code Ann. § 19.2–169.

Because Tuggle had been assured of the limited purpose of the investigation and the protection against self-incrimination, his counsel allowed the examination to occur. Just as in *Estelle v. Smith*, they had no knowledge of the state's intent to trap their client on the "future dangerousness" issue and thus could not advise him on how to deal with the issue.

The sole argument made by the Commonwealth is that Tuggle waived any Fifth or Sixth Amendment rights in his discussion with Centor. The Virginia Supreme Court reached a similar conclusion, although the Court omitted mention of the facts that Centor's examination of Tuggle went beyond the areas ordered by the trial court, that defense counsel were given no notice of this examination, and that the "waiver" Tuggle signed was misrepresented to him and concealed from counsel. *Tuggle v. Commonwealth*, 228 Va. at 514, 323 S.E.2d at 551–52. Thus, despite the Supreme Court's finding, the waiver could not have been voluntarily, knowingly and intelligently made. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).[25] Consequently, the petitioner's petition for writ of habeas corpus will be granted on this basis.

5) The prosecutor argued that Tuggle should be put to death because he would otherwise be released on parole.

a. Exhaustion of the Claim

Petitioner claims that this issue is exhausted because it was presented to the Virginia Supreme Court in Tuggle's appeal from the denial of state habeas corpus relief. Petitioner acknowledges that the Attorney General's Office argued that the case was defaulted on the appeal, but asserts that the Supreme Court rejected the argument on the merits anyway.

It is clear that the Virginia Supreme Court did consider the claim on the merits, *Tuggle v. Bair*, No. 910932 (Va. Nov. 14, 1991), and, therefore, the claim is not barred. *See Wainwright v. Witt*, 469 U.S. 412, 431 n. 11, 105 S.Ct. 844, 855 n. 11, 83 L.Ed.2d 841 (1985); *Briley*, 750 F.2d at 1242 n. 6. Respondents contend that the claim is still procedurally defaulted because Tuggle did not base the argument on federal constitutional grounds in state court. However, based on the court's review of the record, petitioner

24. The Court has since limited *Estelle* to the facts in that case—"the trial judge had ordered, *sua sponte*, the psychiatric examination, and Smith neither had asserted an insanity defense nor had offered psychiatric evidence at trial." *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987).

25. Even assuming the Virginia Supreme Court's ruling was a factual finding, it is not entitled to a presumption of correctness under 28 U.S.C. § 2254(d), because the court never inquired into the facts concerning the waiver allegation. 28 U.S.C. § 2254(d)(1) and (2). The trial court simply allowed the testimony without giving any factual ruling whatsoever to support its admissibility. Moreover, as is described through this opinion, Tuggle was otherwise denied his due process rights in the state trial. 28 U.S.C. § 2254(d)(7). Finally, an examination of the record as a whole clearly demonstrates that the Virginia Supreme Court's finding of waiver is not fairly supported. 28 U.S.C. § 2254(d)(8).

specifically claimed that the prosecutor's closing argument violated his Eighth and Fourteenth Amendment rights. Therefore, there is no procedural default barring consideration of this claim.

b. *The Substance of the Claim*

Petitioner argues that his conviction should be overturned because, during the sentencing phase of the trial, the Commonwealth's Attorney made repeated references to the probability that Tuggle would be released on parole if he were given any sentence other than death.[25] Petitioner contends that the references to future parole were improper and injected unfair prejudice and unreliability into Tuggle's criminal sentencing.

[11, 12] These comments were a clear violation of Virginia law, *Peterson v. Commonwealth*, 225 Va. 289, 302 S.E.2d 520, *cert. denied* 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983) (capital case); *Caldwell v. Commonwealth*, 221 Va. 291, 269 S.E.2d 811 (1980), but violations of state law do not state a federal constitutional claim. *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). Therefore, the court finds that the argument did not violate any of the petitioner's constitutional rights and the respondents' motion to dismiss will accordingly be granted as to this claim.

6) *The "vileness" instruction given to the jury was unconstitutionally vague.*

[13] Petitioner argues that the "vileness" aggravating circumstance instruction given in his case was unconstitutionally vague.[27] In instructing the jury on the "vileness" aggravating circumstance, the trial court refused Tuggle's request to provide definitions of the terms "aggravated battery" and "depravity of mind" contained within the statutory definition of vileness. *See* Va.Code § 19.2-264.4(C). Instead, the trial court simply instructed the jury that it could impose the death penalty if Tuggle's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." Petitioner contends that the court's refusal to allow the terms to be defined compounded the vagueness problem and violated the requirements of the Eighth and Fourteenth Amendments.

Respondents argue that the vagueness of Virginia's "vileness" aggravator was rejected by the Virginia Supreme Court in this case, *see* 228 Va. at 515–16, 323 S.E.2d at 52–53, and has also been repeatedly rejected by the Fourth Circuit Court of Appeals in earlier cases. The cases respondents rely upon for this proposition are inapposite. In those cases, the judge gave a limiting instruction to the Virginia statutory definition of "vileness." *See, e.g., Turner v. Bass*, 753 F.2d 342, 352 (1985), *rev'd on other grounds*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). In this case, no limiting instruction was given. Instead, despite petitioner's requests, only the "vileness" definition which the United States Supreme Court had already found to be unconstitutional was provided to the jury. *See Godfrey v. Georgia*, 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). Because there is a greater need for reliability in the determination that death is the appropriate punishment in a specific case, *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976), it was error for the trial court to refuse to provide limiting instructions. *See Godfrey, supra.* It is especially important in this case that the finding of vileness be correct and founded on a constitutional basis because it is the sole aggravator upon which the Commonwealth now relies to uphold the death sentence. Therefore, Tuggle's petition for habeas relief will be granted on this claim.

7) *Tuggle's appointed trial counsel rendered ineffective assistance of counsel to Tuggle at trial because they were prohibited by the trial court from presenting the kind of defense to which their client was constitutionally entitled.*

[14] Petitioner next contends that his appointed counsel were denied the ability to adequately represent him.[28] Specifically, petitioner contends that his trial counsel were paid minimally for their services, were denied any funds to use in hiring experts to defend him, were denied a change of venue, were deprived of the ability to conduct the minimum necessary voir dire of jurors, were not allowed challenges for cause, and were denied proper jury instructions for petitioner. Petitioner emphasizes that the trial court even refused to accommodate trial counsel's request to spend their own funds to hire an independent psychiatrist.

In *Williams v. Martin*, 618 F.2d 1021 (4th Cir.1980), the Fourth Circuit recognized that a trial court's refusal to provide expert assistance upon the request of an attorney so limited the effectiveness of that attorney's defense that it violated the Sixth Amendment right to counsel. Similarly, Tuggle's counsel was rendered ineffective by the court rulings stripping them of the ability to fairly defend their client. The petitioner's petition will be granted as to this claim.

[15] Petitioner also argues that trial counsel was ineffective in failing to appeal the trial court's denial of their request for an expert pathologist. The Sixth and Fourteenth Amendments protect a criminal defendant's right to the effective assistance of counsel at trial. To demonstrate that this right has been denied, a petitioner must satisfy the two-part test announced in *Strickland v. Washington*, *supra*. First, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. *Id.* 466 U.S. at 688, 104 S.Ct. at 2065. In determining whether the petitioner has made this showing, a reviewing court must give great deference to counsel's tactical decisions because there is a strong presumption that counsel's conduct was within the wide range of objectively reasonable assistance. *Id.* at 688–89, 104 S.Ct. at 2065. Reviewing courts as a general rule are reluctant to assume the task of second-guessing the tactics of defense attorneys. *Goodson v. United States*, 564 F.2d 1071, 1072 (4th Cir.1977).

Second, the petitioner must demonstrate prejudice to his defense. He must show that, but for counsel's errors, there was a reasonable probability that the result of the trial would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is one which undermines confidence in the outcome of the trial. *Id.*

Petitioner asserts that clear case law in the Fourth Circuit at the time established his right to an independent pathologist to assist in his defense and the assistance was necessary to rebut the rape charge. *Williams v. Martin*, *supra*; *see Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981) (indigent defendant in civil paternity case entitled to state-funded expertise). In response to this argument, respondents maintain that, not only was there no clearly established right for petitioner to receive the assistance of an independent pathologist, but that, under *Strickland*, *supra*, petitioner's trial counsel were not ineffective in failing to raise this issue on appeal, since forty other assignments of error were raised and twenty questions presented on direct appeal. Instead, respondents contend that "counsels' decision as to which potential issues to raise or not to raise was based on counsels' best professional judgment."

In this case, it does not appear that petitioner's right to the assistance of an indepen-

25. Specifically, the Commonwealth's Attorney argued:

> But with everything that's been before you and using your own common sense and your own knowledge and the fact that he was tried twelve years ago on murder and they found him guilty of second degree then, and now he's back here again on another horrible offense, the same way, under similar circumstances. The fact that he's here in less time that he was even sentenced to ought to be a message to you as to what will happen if he doesn't get the death sentence. The only thing I want to state to you and let it be known to everybody here and so there is no misunderstanding as to where we stand, is that I can only say God forbid if you give him any type of sentence that permits him to get out of here and do this again, and anything less than death is going to do it.

27. This issue has been exhausted through presentation to the Virginia Supreme Court in the direct appeal of Tuggle's case.

28. These issues have been exhausted through presentation to the Virginia Supreme Court in his appeal from the circuit court's denial of habeas corpus relief.

dent pathologist was so clear that trial counsel was ineffective in failing to pursue this issue, while choosing instead to pursue forty other issues. *Strickland*, 466 U.S. at 688–89, 104 S.Ct. at 2065. Nor does it appear that petitioner would be able to prove prejudice in this case. It has been almost ten years since the offense for which Tuggle was convicted occurred. Thus, it would now be impossible to obtain an independent pathologist report on the rape evidence. While it is clearly not petitioner's fault that no pathologist was appointed in his case and while the appointment of a pathologist may have contributed greatly to his defense, there is no basis upon which the court can rely in determining that the pathologist would have testified in a manner different than the state pathologist. Consequently, petitioner has failed to demonstrate that he has been prejudiced by his attorney's failure to appeal the pathologist issue, *Strickland*, *supra*, and the petition for habeas relief will not be granted on this basis.[29]

8) *Tuggle's conviction and sentence were so infected with error as to deprive him of the protections provided by the Eighth Amendment.*

Petitioner next contends that each of the issues discussed above is sufficient by itself to compel relief, but together they completely undermine the reliability of Tuggle's conviction and sentence so as to violate his Eighth and Fourteenth Amendment rights.[30] Respondents point to *Briley v. Bass*, *supra*, for the proposition that a totality of the circumstances claim will not survive if the asserted grounds are insufficient by themselves to support habeas relief. Although it may be true that such an argument is "without a shred of legal validity," in this case, many of petitioner's claims, by themselves, *are* sufficient to state a claim. However, rather than deciding whether this asserted ground states a claim, the court will defer ruling on this claim and will instead base its ruling on the individual asserted grounds for relief.

9) *The Virginia Supreme Court upheld Tuggle's death sentence after striking the "future dangerousness" aggravating circumstance.*

[16] Petitioner additionally argues that the Virginia Supreme Court unconstitutionally upheld his death sentence solely on the basis of the "vileness" aggravating circumstance.[30] Despite their acknowledgement that the sentencing was unconstitutional because petitioner had been denied the assistance of an independent psychiatrist, *see Ake v. Oklahoma*, *supra*, the Supreme Court merely struck the "future dangerousness" aggravating circumstance and determined that the "vileness" predicate was sufficient to uphold the death sentence. *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838 (1985). The court failed to mention that Tuggle's jury had heard unconstitutional evidence, that Tuggle had been denied the chance to produce evidence to rebut the psychiatric testimony, that Tuggle had been denied the chance to develop his own mitigating evidence through the required psychiatric assistance, or that the prosecutor had repeatedly relied on the psychiatric evidence on future dangerousness as argument for giving Tuggle the death sentence.

Petitioner argues that, because the jury heard the unconstitutional evidence, the mere striking of the "future dangerousness" aggravator could not cure the constitutional error that was committed in Tuggle's trial. Petitioner further argues that the Virginia Supreme Court's decision to affirm Tuggle's death sentence despite the *Ake* error was in

29. Since attorney error short of constitutional ineffectiveness does not constitute cause for default, *Carrier*, *supra*, petitioner has failed to show the necessary cause and prejudice to overcome his procedural default which would enable the court to consider his claim on the merits.

30. Petitioner claims that this issue has been exhausted because the effect of the *Ake* violation was fully adjudicated by the Virginia Supreme Court. Respondent maintains that petitioner has defaulted on this claim, because he never raised the issue in state court. Therefore, respondent claims that petitioner is barred from raising them for the first time in federal habeas. However, it is clear that the Supreme Court has passed on this issue with respect to petitioner's case and, therefore, the claim is exhausted. *See Preiser*, *supra*.

complete violation of Virginia's own statute guaranteeing sentence review in a capital case. Va.Code § 17–110.1.[31] In addition, Petitioner asserts that the sentence was clearly imposed "under the influence of ... prejudice or any other arbitrary factor" because the jury imposed it after hearing illegal testimony and argument concerning Tuggle's future dangerousness.

Respondent makes no defense to these claims, except to allege that the claim is not exhausted and is barred by the "new rule" doctrine. As discussed *supra*, the claim has been properly exhausted, so that argument is without merit. The court similarly finds no merit in the respondents' "new rule" allegation. Although respondent contends that *Teague v. Lane*, *supra*, bars consideration of the *Ake* violation, the resolution of that claim does not rely on any new rule, but rather on *Ake* itself. Since *Ake* was decided before petitioner's conviction became final, the court is not barred from consideration of this claim. *See Teague*, *supra*.

Petitioner finally argues that the sentence violated Va.Code § 17–110.1 because the Virginia Supreme court performed no analysis to determine whether the sentence was disproportionate or excessive. Petitioner acknowledges that the court did perform an analysis on direct appeal, comparing Tuggle's case with others in which the jury found both statutory aggravating circumstances, but that, after striking the "future dangerousness" aggravator, the Supreme Court did not compare Tuggle's case—in which the victim died of a single gunshot wound—with other capital crimes in which the "vileness" aggravator was the sole factor.

[17–19] The United States Supreme Court has held that such appellate review procedures are a critical part of the protections that must shape the imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). However, a federal district court entertaining a habeas corpus petition does not sit as a court of appeals over a state supreme court. *See Holloway v. Woodard*, 655 F.Supp. 1245, 1249 (W.D.N.C.1987). While the proportionality issue is not cognizable in federal habeas because the Constitution does not require proportionality review, *Pulley v. Harris*, 465 U.S. 37, 43–44, 104 S.Ct. 871, 875–76, 79 L.Ed.2d 29 (1984); *Briley v. Bass*, 584 F.Supp. 807, 835, meaningful appellate review is constitutionally required in capital cases. Therefore, the complete absence of analysis in the Tuggle remand constitutes an independent constitutional violation. *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). The petition for habeas relief will accordingly be granted on this basis.

10) *The Virginia death penalty statute is unconstitutional because of the vagueness of the "vileness" aggravating circumstance.*

Petitioner finally claims that Virginia's "vileness" aggravating circumstance is so vague and standardless as to be in violation of the Eighth and Fourteenth Amendments.[32] Although the petitioner sets forth some strong arguments as to the invalidity of the "vileness" aggravating factor, the court declines to hold the statute unconstitutional, especially since so many other constitutional violations are present in this case which mandate that the petition for writ of habeas corpus be granted. The respondents' motion to dismiss this claim will accordingly be denied.

Based on the foregoing, the court finds that the result of petitioner's conviction for murder in the commission of rape is inherently unreliable because it is the product of several violations of petitioner's constitutional rights. Consequently, Tuggle's petition

31. This section provides as follows:
In addition to consideration of any errors in the trial enumerated by appeal, the [Supreme Court] shall consider and determine:
1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; *and*
2. Whether the sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and defendant.
See Va.Code § 17–110.1(C).

32. This claim is exhausted because it was presented to the Virginia Supreme Court on direct appeal.

for writ of habeas corpus is granted. It is so ORDERED.

The clerk of the Court is directed to send certified copies of this Memorandum Opinion and accompanying Order to counsel for petitioner and to counsel of record for the defendants.

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff,

v.

PERRY BROTHERS, INC., Defendant and Counter-Plaintiff,

v.

NATIONSBANK OF TEXAS, N.A. f/k/a NCNB Texas National Bank, N.A., Counter-Defendant.

Civ. A. No. 9: 91 CV 181.

United States District Court, E.D. Texas, Lufkin Division.

June 3, 1994.

Federal Deposit Insurance Corporation (FDIC) sued borrower on promissory note, and borrower counterclaimed against lender bank. The District Court, Robert M. Parker, Chief Judge, held that: (1) borrower established duty of good faith and fair dealing claim; (2) lender bank breached contract to renew line of credit; (3) borrower established economic duress claims; and (4) borrower established fraud claim.

Ordered accordingly.

1. **Banks and Banking ⇐100**
Contracts ⇐168

Under Texas law, borrower established duty of good faith and fair dealing claims against lender bank, where lender bank and borrower agreed to deal with each other in spirit of good faith and fair dealing, lender bank expressly agreed to continue course of dealing that had typified relationship between borrower and failed bank, the assets of which had been purchased by lender bank, and as result of borrower's reliance or dependence upon lender bank's promises, imbalance of bargaining power was subsequently created and exploited by lender bank.

2. **Torts ⇐6**

Under Texas law, relationship between debtor and creditor alone does not lend itself to general imposition of duty of good faith and fair dealing, but duty of good faith and fair dealing may arise: by agreement: in particular circumstances, between parties as result of long-standing, special relationship of trust and confidence between them: and when imbalance of bargaining power exists, at least when defendant is responsible for imbalance.

3. **Torts ⇐28**

Under Texas law, whether duty of good faith and fair dealing exists in particular case depends on factual setting and interplay of factual and legal questions.

4. **Insurance ⇐602.2(1)**

Under Texas law, duty of good faith and fair dealing arises as matter of law in insurance context because of generally unequal bargaining power between insurer and insured, and nature of insurance contracts themselves, in that unscrupulous insurers could take advantage of insureds' misfortunes in bargaining for settlement or resolution of claims absent general recognition of such duty.

5. **Banks and Banking ⇐100**

Under Texas law, relationship between lender bank and borrower was extraordinary banking relationship clearly marked by parties' shared trust, for purposes of imposition of duty of good faith and fair dealing on lender bank, where lender bank promised to assume role and obligations associated with role of failed bank, the assets of which had been as purchased by lender bank and with which borrower had established long time, special relationship, and lender bank specifi-

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EXHIBIT B

Id. at 1447. Thus, even the one circuit that applies the Rehabilitation Act to prisons now refuses to scrutinize a claim brought under the Act any more closely than it would an Eighth Amendment claim; in this circuit, as *Taylor* recognized, that is a highly deferential standard.[17] In view of this consensus that any rights prisoners enjoy—including the right of disabled inmates to some degree of accommodation—must be assessed in light of the requirements of prison administration, VDOC officials could certainly have reasonably concluded that their actions were consistent with "a morbidly obese inmate's right to the modification of specific [prison] services and facilities."

VDOC officials took significant steps to address Torcasio's obesity-related grievances. Upon his arrival to Keen Mountain, prison officials first placed Torcasio in the prison infirmary, which was equipped with most of the disability accommodations Torcasio demanded, including side railings and wide bathroom access. *Torcasio v. Murray*, 862 F.Supp. 1482, 1486 (E.D.Va.1994). Because inmates housed in the infirmary receive less freedom and fewer privileges than other inmates, however, Torcasio himself requested a transfer into the general population, which was granted. Having granted his request to be moved into the general inmate population, prison officials further accommodated Torcasio's weight and mobility limitations by (1) providing him with a private cell originally designed to house two inmates, (2) removing the existing beds from that cell and installing in their place a full-size hospital bed equipped with railings, (3) providing reinforced chairs for Torcasio to use in both his cell and the dining hall, and (4) installing mats and handrails in the shower area. These attempts to accommodate Torcasio's condition at Keen Mountain were in keeping with the prior practice of VDOC officials, who, in response to Torcasio's complaints during his confinement at other VDOC facilities, had granted him a step into the shower, a handrail in the shower, a free-standing locker as opposed to a foot-locker, and a CPAP device (equipped with a backup power system to allow the machine to continue functioning if the electricity went out) to assist his breathing while he slept. Appellants' Br. at 31. This portfolio of accommodations of course did not satisfy all of Torcasio's requests, but certainly could have been viewed by a reasonable prison administrator as a satisfactory accommodation of whatever right Torcasio had to modification of prison facilities, providing yet another basis for reversal of the district court's partial denial of qualified immunity.

CONCLUSION

The judgment of the district court is affirmed insofar as it granted the appellants' motion for summary judgment on the grounds of qualified immunity, and reversed insofar as it denied that motion. The case is remanded with instructions to dismiss all claims against the appellants.

AFFIRMED IN PART, REVERSED IN PART.

17. A panel of this court earlier described Torcasio's complaints as "inconveniences," and ruled that they "do not, objectively, amount to a 'serious deprivation of a basic human need' " that would violate the Eighth Amendment. *Torcasio v. Murray*, No. 93-6585, 1993 WL 491310, at **1 (4th Cir. Nov. 15, 1993) (unpublished) (quoting *Strickler v. Waters*, 989 F.2d 1375, 1379 (4th Cir.1993)). Under the Ninth Circuit's standard in *Gates*, therefore, Torcasio's claim that his ADA and Rehabilitation Act rights were violated would lose *on the merits*.

Lem Davis TUGGLE, Petitioner-Appellee,

v.

C.E. THOMPSON, Warden,
Respondent-Appellant.

No. 94-4005.

United States Court of Appeals,
Fourth Circuit.

Argued Feb. 2, 1995.

Decided June 29, 1995.

After his conviction for murder and sentence of death were affirmed by the Virginia Supreme Court, 334 S.E.2d 838, and that court denied habeas corpus, defendant sought habeas corpus in federal court. The United States District Court for the Western District of Virginia, James C. Turk, J., 854 F.Supp. 1229, granted relief, and state appealed. The Court of Appeals, Chapman, Senior Circuit Judge, held that: (1) pretrial publicity did not require change of venue; (2) any error in denying right to challenge prospective jurors for cause outside the presence of the panel was not a basis for federal habeas relief; (3) even after aggravating circumstance of future dangerousness was set aside, sentence could stand based on jury finding of vileness; (4) instruction on vileness was not unconstitutionally vague; and (5) evidence was sufficient to sustain the conviction.

Reversed and remanded with instructions.

1. Courts ⇐107

Denial of petition for certiorari by United States Supreme Court is not binding precedent.

2. Homicide ⇐358(1)

In a "weighing state," jury considering death penalty is specifically instructed to weigh mandatory aggravating and mitigating circumstances in exercising its discretion as to whether to impose the death penalty whereas, in non-weighing states, such as Virginia, statutory scheme helps perform function of narrowing the category of persons convicted of murder who are eligible for the death penalty by a narrow definition of capital murders and the requirements for aggravating circumstances. Va.Code 1950, §§ 18.2-32, 19.2-264.2.

3. Criminal Law ⇐796

If statutory sentencing procedures sufficiently guide and challenge jury's discretion so as to minimize risk of wholly arbitrary and capricious jury action in imposing death sentence, instruction to jurors to weigh mitigating and aggravating circumstances is not required by the Federal Constitution. Va. Code 1950, §§ 18.2-32, 19.2-264.2.

4. Criminal Law ⇐1208.1(5)

Even after finding of "future dangerousness" was set aside, sentence of death based on aggravating circumstance of vileness could stand under Virginia's "non-weighing" sentencing scheme. Va.Code 1950, §§ 18.2-32, 19.2-264.2.

5. Criminal Law ⇐121

Matters of change of venue are committed to sound discretion of trial court.

6. Criminal Law ⇐124

Neither newspaper articles reporting on crime and defendant's arrest, fact that eight members of the venire were excused by court during voir dire because they reported that they had formed an opinion as to defendant's guilt, nor fact that five other jurors had read newspaper articles concerning the case required change of venue.

7. Criminal Law ⇐124

Prior knowledge of facts reported in the media is not sufficient to require change of venue because of media publicity.

8. Habeas Corpus ⇐770

Findings by state Supreme Court that there was not widespread prejudice against defendant in the county where he was tried so as to require change of venue was presumed to be correct and was binding on federal habeas corpus court in the absence of one of the statutory circumstances. 28 U.S.C.A. § 2254(d)(1-7).

9. Habeas Corpus ⇐496

Failure of trial court to allow defendant the opportunity to challenge jurors for cause out of the presence of the panel, even if a violation of state law, did not support federal habeas corpus relief.

10. Jury ⇐131(13)

There is no constitutional right to be allowed to challenge for cause outside the presence of the panel.

11. Habeas Corpus ⇐496

Habeas petitioner did not show that he was prejudiced by fact that four potential jurors, one of whom actually sat on the jury, had been contacted by media representatives

concerning a prior case on which they sat which did not involve defendant.

12. Habeas Corpus ⇐196, 706

It was not sufficient for habeas petitioner to allege that a voir dire was inadequate and that as a result he was denied an impartial jury; rather, burden was on him to demonstrate strong possibility of jury bias.

13. Rape ⇐7

Under Virginia law, conviction for rape requires that evidence establish beyond a reasonable doubt that accused had sexual intercourse with a female by force and against her will and that there was an actual penetration to some extent of the male sexual organ into the female's sexual organ, but penetration need only be slight.

14. Criminal Law ⇐1144.13(3)

When sufficiency of evidence is challenged on appeal, evidence and all reasonable inferences fairly drawn therefrom must be viewed in the light most favorable to the prosecution.

15. Rape ⇐51(1)

Conviction for rape was supported by evidence that body of victim was discovered with her blouse pulled up to the arm pits, her pants down around her knees, her panties rolled down somewhat, and one of her legs out of her panty hose, and that there was a bite mark present on inner quadrant of right breast and large bruise on upper inner thigh, contusions of the vaginal vault, and semen present in the rectum.

16. Habeas Corpus ⇐768

Presumption of correctness of state court factual findings applies to facts found by appellate courts as well as trial courts. 28 U.S.C.A. § 2254(d).

17. Criminal Law ⇐796

Instruction that jury could impose penalty of death if it found beyond a reasonable doubt that defendant's conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, and that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder was not unconstitutionally vague.

18. Criminal Law ⇐1208.1(5)

Purpose of having aggravating circumstances in capital case is to narrow class of persons who receive the ultimate penalty.

ARGUED: Donald Richard Curry, Sr. Asst. Atty. Gen., Office of Atty. Gen., Richmond, VA, for appellant. Timothy Michael Kaine, Mezzullo & McCandlish, Richmond, VA, for appellee. **ON BRIEF:** James S. Gilmore, III, Atty. Gen. of Virginia, Richard B. Smith, Asst. Atty. Gen., Office of Atty. Gen., Richmond, VA, for appellant. Helen L. Konrad, Mezzullo & McCandlish, Richmond, VA; Barry A. Weinstein, Donald R. Lee, Jr., Virginia Capital Representation Resource Center, Richmond, VA, for appellee.

Before WIDENER and HAMILTON, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

Reversed and remanded with instructions by published opinion. Senior Judge CHAPMAN wrote the opinion, in which Judge WIDENER and Judge HAMILTON joined.

OPINION

CHAPMAN, Senior Circuit Judge:

This is an appeal by the warden of the Mecklenburg Correctional Center from a judgment of the United States District Court for the Western District of Virginia which granted a writ of habeas corpus to Lem Davis Tuggle (Tuggle), who was convicted of capital murder committed during or subsequent to the rape of Mrs. Jessie Geneva Havens and was given a death sentence. The murder and rape occurred on or about May 28, 1983.

The verdict and sentence resulted from a jury trial which concluded on March 21, 1984. Tuggle's conviction and sentence were affirmed by the Supreme Court of Virginia on November 30, 1984. *Tuggle v. Virginia*, 228 Va. 493, 323 S.E.2d 539 (1984) (*Tuggle I*). A writ of certiorari was filed with the Supreme Court of the United States. On May 13, 1985, the court, in a summary disposition, held "[M]otion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Ake v. Oklahoma*, 470 U.S. 68 [105 S.Ct. 1087, 84 L.Ed.2d 53] (1985)." *Tuggle v. Virginia*, 471 U.S. 1096, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985).

Upon remand, the parties briefed and argued to the Supreme Court of Virginia the issue of *Ake*'s impact on Tuggle's conviction and sentence. In *Tuggle v. Virginia*, 230 Va. 99, 334 S.E.2d 838 (1985) (*Tuggle II*), the court held that the trial court had erred under *Ake* in failing to provide Tuggle with an independent psychiatrist to assist him at the penalty-stage of the trial, and as a result, the jury's finding of "future dangerousness" could not stand; however, the court concluded that the jury's separate finding of "vileness" was sufficient and independently supported Tuggle's death sentence under Virginia law and under *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *Tuggle II*, 334 S.E.2d at 844–46.

Tuggle again petitioned for a writ of certiorari in the Supreme Court of the United States and raised most of the issues upon which the United States District Court ultimately granted the Great Writ; however, this petition was denied on June 30, 1986. *Tuggle v. Virginia*, 478 U.S. 1010, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986).

Tuggle then filed for habeas corpus in the criminal court of Smyth County, and after briefing and oral argument, the court denied and dismissed his petition. The Supreme Court of Virginia refused his petition to appeal on November 14, 1991, and his third petition for certiorari was denied by the Supreme Court of the United States on April 20, 1992. *Tuggle v. Bair*, 503 U.S. 989, 112 S.Ct. 1681, 118 L.Ed.2d 397 (1992).

On September 25, 1992, claiming constitutional errors in his trial, Tuggle filed his habeas corpus petition in the United States District Court for the Western District of Virginia.

On June 8, 1994, the district court granted Tuggle's petition, vacated his conviction and sentence, and ordered the Commonwealth to retry him within six months. Shortly thereafter, the district court granted the Commonwealth's motion to stay the retrial and release pending appeal to this court.

We have had the benefit of excellent briefs and oral arguments of counsel, and we find that the district court made numerous errors of law in granting Tuggle habeas corpus relief. Therefore, we reverse and remand this action to the district court with instructions to dismiss the petition.

I.

The facts relating to Tuggle's guilt were uncontroverted as he presented no evidence at that stage of the trial. The Virginia Supreme Court summarized the facts as follows:

> On Saturday night, May 28, 1983, Tuggle attended a dance at the American Legion Lodge in Marion, and upon his arrival, he asked if he could "check" a gun. He was advised that he could not. Tuggle was told that he should lock the gun in the trunk of his car. He left the building briefly, and when he returned, said, "That's taken care of."
>
> The victim, Jessie Geneva Havens, and two friends also were at the dance. The defendant introduced himself to them as David Tuggle. He sat at a table with the three women and danced with them throughout the evening.
>
> When the dance ended at 1:00 a.m. Sunday, Havens' two friends left together and she left with Tuggle. The defendant had agreed to drive Havens to her home; she advised him that she had to go directly home because her granddaughters were staying with her. As her two friends were leaving the parking lot, they observed that Havens was standing next to the passenger side of the defendant's automobile, and Tuggle was opening the trunk. Havens was wearing blue jeans, a blue and white striped blouse, and moccasin-type shoes. Shortly thereafter, State Trooper G.N. Smith stopped the defendant's automobile

because it was weaving on the highway near Seven Mile Ford in Smyth County. Tuggle was driving, and the trooper observed a large, middle-aged, white female sitting in the front seat of the automobile "right next to the driver." The woman was wearing jeans and a blue, green, or aqua blouse. After the trooper determined that the defendant was not intoxicated, Tuggle drove away in the direction of Hubble Hill Road. Havens never returned home, and at six o'clock that evening, the police were notified that she was missing.

In the early morning of June 2, 1983, State Trooper R.M. Freeman was dispatched to an area on Interstate Highway 81 in Pulaski County to look for a black pickup truck equipped with a camper. Shortly after his arrival, Freeman stopped a truck meeting that description and recognized Tuggle as the driver. When the trooper asked the defendant if he had been near the Riverside Exxon Station, Tuggle responded: "Yes, I robbed it, the money's in my pocket, the gun's in the truck."

Thereupon Freeman took possession of a .25 caliber automatic weapon. (Ballistics tests established that this gun fired the bullet which killed Havens). While Freeman was taking Tuggle to the Pulaski County Sheriff's Office, Tuggle volunteered that he was connected with a missing person's report relating to Jessie Havens and said that he would have a "long talk" with Smyth County authorities later. Later that morning, a Smyth County Sheriff's Office investigator interviewed Tuggle concerning Havens' disappearance. The officer advised Tuggle of his *Miranda* rights. Tuggle waived these rights and told the officer that he could find Jessie Havens over a bank at a certain spot on Hubble Hill Road near Seven Mile Ford. When the officer asked the defendant what had happened to Havens, Tuggle responded: "I don't know but she's there." The defendant then told the officer that he did not want to discuss the matter further until he had spoken to an attorney. He specifically stated: "From past experience, I would like to talk to an attorney. I'll probably tell you the full story later."

Approximately 9:30 a.m. on June 2, the investigator went to the place where Tuggle said Havens would be found. He found Havens' body at the site. Havens was clad in jeans "down around her knees," a blue and white striped blouse "pulled up to about the armpits," and "black silk panties . . . rolled down somewhat." A portion of the victim's pantyhose was "sticking out of the top" of her jeans, and one of her legs was out of the pantyhose.

An autopsy revealed that the victim's body had an abrasion and a bruise on the left frontal area of the forehead, a small abrasion on the right frontal area of the forehead, an abrasion on the neck, a bite mark on the lower, inner quadrant of the right breast, a number of small bruises on the upper, inner aspect of the right arm, and a bruise on the right thumb and right wrist. Havens also had sustained a large bruise on the upper, inner thigh, bruises on the vaginal vault at the posterior aspect and near the bottom, and a gunshot wound in the chest.

According to the medical examiner, "the bruises of the vagina indicate penetration of the vaginal vault by something, a penis, a finger, an object, something." The medical examiner testified that both the bite mark on the breast and the bruising around the vagina occurred while Havens was alive. He also testified that no semen or spermatozoa was found in Havens' vagina, but that semen was found in the rectum, indicating "penetration and ejaculation into the rectum."

A forensic odontologist testified that he examined the bite mark on the victim's right breast. He compared the mark with models of Tuggle's teeth and concluded "with all medical certainty these marks on the body of Ms. Havens were made by the teeth of Mr. Tuggle." He further opined that Havens was alive and moving when she was bitten.

Tuggle I, 323 S.E.2d at 543–44.

The trial was conducted from January 17–19, 1984, and in the penalty phase, the jury found both "future dangerousness" and "vileness" which are statutory predicates to a death sentence in Virginia. *See* Va.Code Ann. § 19.2-264.2 (1990). The trial court confirmed the jury's verdict and sentenced Tuggle to death on March 21, 1984. He appealed his conviction and sentence to the Virginia Supreme Court which affirmed both on November 30, 1984 in *Tuggle I*. The appellate history of this case has been recited above.

Tuggle's petition for writ of habeas corpus in the United States District Court for the Western District of Virginia raised the following allegations.

(1) The trial court failed to appoint an independent psychiatrist and pathologist to assist in his defense;

(2) The conduct of the trial judge and the prosecution denied him his right to an impartial jury;

(3) There was insufficient evidence to prove "penetration" to support a finding of rape under Virginia law;

(4) The trial court erred in allowing Dr. Centor to testify that Tuggle would be "future dangerous" because he interviewed Tuggle outside the presence of counsel and without a waiver of his Fifth and Sixth Amendment rights;

(5) The prosecutor argued that Tuggle should be put to death because he would otherwise be released on parole;

(6) The "vileness" instruction was unconstitutionally vague;

(7) Various rulings by the trial judge prevented Tuggle's appointed trial counsel from rendering effective assistance;

(8) Tuggle's conviction and sentence were so infected with error as to violate the Eighth Amendment;

(9) The Virginia Supreme Court improperly upheld Tuggle's death sentence after striking the "future dangerousness" aggravating circumstance; and

(10) Virginia's "vileness" aggravating circumstance is vague.

On June 8, 1994, the district court granted Tuggle relief and held:

(1) Tuggle had been deprived of the needed assistance of expert psychiatric testimony which thwarted "his very ability to make a record on a critical point or even to rebut the evidence marshaled against him."

(2) Tuggle's right to a trial by an impartial jury was violated by the conduct of the trial judge and the prosecution in: (a) failing to grant a change of venue because of pre-trial publicity; (b) contact with jurors before trial by the media and law enforcement officials; (c) the refusal of defendant's request for additional voir dire concerning jurors' exposure to publicity and other contacts; and (d) the trial judge's refusal to allow challenges to jurors for cause.

(3) The evidence was insufficient to convict Tuggle of murder during the commission of a rape.

(4) The trial court erred in allowing Dr. Arthur Centor to testify that Tuggle posed a "future danger" to society because such testimony was based on discussions with Tuggle outside the presence of counsel without a waiver of his Fifth and Sixth Amendment rights.

(5) The "vileness" instruction given to the jury was unconstitutionally vague.

(6) The Virginia Supreme Court erred in upholding his death sentence after it had struck the "future dangerousness" aggravating circumstance and in finding the "vileness" predicate was sufficient to uphold the death sentence.

II.

The district court's opinion causes us considerable concern because it appears that the court has overlooked the real posture of the case presented. Here we are dealing with a collateral attack upon a state criminal conviction resulting from a trial by jury that has been twice heard by and written opinions filed by the highest court of the Commonwealth, and that has been three times presented to the United States Supreme Court by way of petition for certiorari. However, the district court opinion appears to have considered the case, including the facts and the law, as if it were the original trial or appellate court without regard to prior findings of fact and numerous decisions of this court. The district court gave little or no

deference to any findings of fact by the courts of the Commonwealth of Virginia as directed by *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) or the presumption of correctness established by 28 U.S.C. § 2254(d).

A.

The district court found that Tuggle's ability to defend himself was thwarted by the trial judge's refusal to appoint a psychiatrist to rebut the testimony of Dr. Arthur Center as to Tuggle's future dangerousness, and that the Virginia Supreme Court erred in *Tuggle II* when it allowed the "vileness" aggravating circumstance to stand as support for the death sentence after it had set aside the "future dangerousness" circumstance under *Ake*. The district court also found that there was constitutional prejudice to Tuggle by the spill-over effect of the future dangerousness evidence heard by the jury at the sentencing phase, because this evidence was inadmissible on the issue of vileness. The court also found that the Virginia Supreme Court had misinterpreted *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) when it held that the jury finding on vileness could stand. The district court relied upon *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) as to the adverse effect of the inadmissible evidence.

[1] Tuggle sought certiorari to the Supreme Court after the Virginia Supreme Court decided in *Tuggle II* that the *Ake* error did not impair or invalidate the jury's finding of vileness and again affirmed the death sentence. The Supreme Court denied cert although Tuggle's second petition clearly presented the issue of whether *Zant v. Stephens* was "meant to serve as a wholesale invitation to appellate courts to ignore constitutional infirmities in the sentencing phase of a capital trial, so long as more than one aggravating circumstance is found. [Because] that it is how the decision is being applied in Virginia." Denial of a petition for certiorari is not binding precedent, but the court has clearly indicated that it would grant certiorari after a remand for reconsideration in light of a new case, when it finds the lower court has misinterpreted the remand or if it disagrees with the action taken on remand. *See Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991); *Burden v. Zant*, — U.S. —, 114 S.Ct. 654, 126 L.Ed.2d 611 (1994).

[2] In deciding whether the Virginia Supreme Court in *Tuggle II* misapplied *Zant v. Stephens*, it is vital to remember that Virginia is a "non-weighing" state. *Swann v. Virginia*, 247 Va. 222, 441 S.E.2d 195, 205 (1994), *cert. denied*, — U.S. —, 115 S.Ct. 234, 130 L.Ed.2d 158 (1994). In "weighing" states, the jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion as to whether to impose the death penalty. In "non-weighing" states, such as Virginia, the statutory scheme helps perform the function of narrowing the category of persons convicted of murder who are eligible for the death penalty by a narrow definition of capital murder, Va.Code Ann. § 18.2–32 (1988) and the requirement for aggravating circumstances, Va.Code Ann. § 19.2–264.2 (1990).

[3] If the statutory sentencing procedures sufficiently guide and channel the jury's discretion so as to minimize the risk of wholly arbitrary and capricious jury action in imposing the death sentence, a weighing instruction is not required by the federal Constitution. *Zant*, 462 U.S. at 874–75, 103 S.Ct. at 2741–42.

[4] In granting Tuggle a writ of habeas corpus, the district court neither discussed the difference between weighing and nonweighing states nor mentioned the effect of *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), which discusses the import and effect of invalid aggravating factors in weighing states and the appellate scrutiny required in such states. *Stringer* clearly points out the difference between capital punishment procedures that require weighing and those that do not:

> With respect to the function of a state reviewing court in determining whether the sentence can be upheld despite the use of an improper aggravating factor, the difference between a weighing State and a nonweighing State is not one of "semantics," as the Court of Appeals thought, but of critical importance. In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in the earlier stage of the proceedings. But when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume that it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant receive an individualized sentence. This clear principle emerges not from any single case, as the dissent would require, but from our long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing. Thus, the principal difference between the sentencing systems of Mississippi and Georgia, the different role played by aggravating factors in the two States, underscores the applicability of *Godfrey [v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)] and *Maynard [v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)] to the Mississippi system.

Id. 503 U.S. at 231–32, 112 S.Ct. at 1137 (citations omitted).

In *Tuggle II*, the Virginia Supreme Court concluded that in light of *Ake*, the trial court had erred in denying Tuggle's motion for an independent psychiatrist to rebut the Commonwealth's psychiatric evidence of future dangerousness even though Tuggle had never requested the psychiatrist to rebut future dangerousness but only requested the psychiatrist to reevaluate him as to sanity and competency to stand trial. *Id.* at 844. The Virginia court also concluded:

> When a jury makes separate findings of specific statutory aggravating circumstances, any of which could support a sentence of death, and one of the circumstances subsequently is invalidated, the remaining valid circumstance, or circumstances, will support the sentence.

Id. at 845 (citing *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)).

In *Tuggle II*, the court reviewed the evidence as to vileness and stated:

> In *Tuggle*, the jury made a separate, specific finding that the "vileness" predicate had been proved beyond a reasonable doubt. Although *Ake* requires the conclusion that the trial court erred in denying Tuggle an independent psychiatrist once the Commonwealth had submitted psychiatric evidence on the issue of future dangerousness, we hold, nonetheless, that the error neither impairs nor invalidates the jury's finding of vileness.

Id. at 846.

The district court's reliance upon *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), is misplaced because Mississippi uses the "weighing system," and Virginia does not.

As to the spill-over effect of the psychiatric evidence relating to future dangerousness, we have decided this issue in *Smith v. Procunier*, 769 F.2d 170 (4th Cir.1985), *cert. granted in part Smith v. Sielaff*, 474 U.S. 918, 106 S.Ct. 245, 88 L.Ed.2d 254 (1985), *aff'd Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986):

> On the merits, we immediately come up against the consideration of the jury's verdict recommending a death sentence was supported by two separate and distinct grounds of aggravation: (a) dangerousness (i.e., violence) and (b) vileness. The asserted errors of constitutional dimension relating to the admission of psychiatric testimony were in testimony directed to the question of "dangerousness." The evidence presented to the jury supporting a showing of "vileness" was unchallenged. The testimony in the guilt phase of the case amply provided a basis for a decision that the crime was vile. Having met the

victim on a beach, Smith paused to help remove briars from her feet. The appearance of kindness immediately dissipated when Smith grasped the victim's arm, took her to a wooded area, produced a knife, and told her to undress. He then forced her to have intercourse and, following that, choked her, dragged her into the water, submerged her head, stabbed her, and left the dead victim lying where she fell. The immediate cause of death was drowning, although the testimony indicated the stab wounds and strangulation also could have been responsible.

This court recently decided in *Briley v. Bass*, 742 F.2d 155, 165 (4th Cir.1984), that any one aggravating circumstance deemed sufficient by the jury suffices:

> [S]ince the jury returned a verdict finding the death sentence warranted under both "vileness" and the "dangerousness" standard, it is of no importance whether the instruction on "vileness" was correct so long as the instruction on "dangerousness" was correct, provided, of course, the verdict of the jury was unanimous on the "dangerousness" ground.

Similarly, the Supreme Court in *Zant v. Stephens* stated that

> [A] death penalty supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance is "invalid" in the sense that it is insufficient itself to support the death penalty.

Procunier, 769 F.2d at 173 (footnotes omitted) (citation omitted) (alterations in original).

The district court erred in finding that the Virginia Supreme Court erred in allowing the death sentence to stand on the "vileness" aggravating circumstance after setting aside the "future dangerousness" finding under *Ake*, and we reverse the granting of the writ on this ground.

B.

The district court ruled that Tuggle was denied his constitutional right to a trial by an impartial jury by the conduct of the trial judge and the prosecution in: (a) failing to grant a change of venue because of pretrial publicity; (b) the contact of jurors prior to trial by the media and law enforcement officials; (c) the trial court's failure to allow adequate voir dire concerning the jurors' exposure to publicity and other contacts; and (d) the trial court's refusal to allow challenges for cause.

i.

[5] The record does not support the district court's finding that pretrial publicity was sufficient to deny Tuggle an impartial jury or to require the trial judge to change the venue. The district court's holding on this point is clearly erroneous. Matters of change of venue are committed to the sound discretion of the trial court, and we find no abuse of this discretion on the present facts.

[6] The newspaper articles of which Tuggle complains are a part of the record and have been carefully reviewed by us. The first news article appeared in the June 2, 1983 edition of the Smyth County News and reported only that the victim, Jessie Geneva Havens, was missing and had failed to return from a dance on Saturday night. It gave a physical description of Mrs. Havens and stated: "Police will not say at this time if they suspect foul play." On June 7, 1983, the same publication contained a report that Tuggle was in custody and had not confessed to killing the victim, but he had told police where her body could be found. The body was found at this location and an autopsy revealed that the victim died from a .25 caliber pistol wound to the heart. The story stated that a .25 caliber pistol was found on Tuggle when he was arrested. The same issue of the paper reported that Tuggle had been convicted of second degree murder in 1972 for killing a 17 year old female in the Marion, Virginia area.

The June 14, 1983 issue of the paper reported that Tuggle was confined in a secure cell with little chance of escape. This article was in response to an article that had appeared in a Bristol, Virginia paper which questioned the security of Tuggle's confinement, and stated he had escaped from prison on two previous occasions.

The June 23, 1983 issue of the Smyth County News contained a letter from "The Family of Jessie G. Havens" commending the Sheriff's Department of Smyth County for its help and understanding in "the recent loss of our mother." There was no mention of Tuggle in this letter.

The August 4, 1983 edition of the Smyth County News contained a very short story reporting that the preliminary hearing had been delayed until August 15, 1983. The August 16, 1983 edition of the same paper reported a further delay in the preliminary hearing.

On October 18, 1983, both the Smyth County News and the Bristol Herald Courier reported that following the preliminary hearing, probable cause had been found, and Tuggle had been bound over to the grand jury on charges of capital murder, rape, use of a firearm in commission of the murder, armed robbery, use of a firearm in the armed robbery, and possession of a firearm by a convicted felon. The Smyth County News reported on November 3, 1983 that Tuggle had been indicted by the grand jury on the five original charges plus an additional charge of forcible sodomy. There were ten weeks between this last newspaper article and the beginning of the trial on January 17, 1984.

All of the newspaper articles were factual in nature and several were very short—stating only that the hearing had been continued. None of the news stories would be considered inflammatory. There is no record of radio or TV coverage of the crime, and no claim that radio or television created any prejudice toward Tuggle or would necessitate a change of venue.

Tuggle argues that the fact that eight members of the venire were excused by the court during voir dire because they reported they had formed an opinion as to Tuggle's guilt, proved the effect of the excess of pretrial publicity. We do not follow this reasoning. Such fact only demonstrates the necessity of asking appropriate questions to prospective jurors, and the Supreme Court of Virginia in *Tuggle I* viewed the fact that "[i]t took only 28 prospective jurors to secure a panel of 20" as evidence that there had not been widespread local prejudice against Tuggle because of media reports. 323 S.E.2d at 545.

Tuggle also argues that five of the petit jurors had read newspaper articles concerning the case. However, each of the jurors advised the court under oath that they could decide the case impartially and consider only the evidence presented in the courtroom. In this day of instant communication, it is not unusual for jurors to have heard or read about a case, and such prior knowledge does not disqualify a person from becoming a juror, and this circumstance does not require a trial judge to change venue.

Tuggle further asserts that one or more of the newspaper articles falsely reported that he had been previously convicted of rape and was a suspect in another rape, and that one paper falsely stated that the death penalty was mandatory in Virginia for murder committed during the rape. These articles appeared several months prior to trial, and there is no evidence to suggest that the jurors were influenced in any way by these articles. The article concerning the death penalty stated: "Capital murder includes murder during the commission of rape" and "In Virginia, capital murder can be punished only by death in the electric chair." Whether this article contains a correct statement of the law of Virginia is of no moment, because these articles appeared months before the trial, and the jury was correctly instructed on the law of capital murder by the trial judge during Tuggle's trial.

[7] The district court's finding that pretrial influences of the jury resulting from media publicity, media contact with members of the jury, the reading by some members of the jury of articles concerning the case and a false story stating that Tuggle had committed another rape deprived Tuggle of his constitutional right to an impartial jury overlooks the well established law on this issue of what must be shown by a defendant who challenges his conviction because of alleged pretrial publicity or local bias. Tuggle did not show as required under the test established in *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), that "the setting of the trial was inherently prejudicial

or that the jury-selection process of which he complains permits an inference of actual prejudice." *Id.* at 803, 95 S.Ct. at 2038.

Prior knowledge of facts reported in the media is not sufficient. In *Murphy*, many jurors had heard of the defendant through extensive news coverage and there was extensive knowledge in the community of either the crimes or the putative criminal, and the court found this was not sufficient to render a trial constitutionally unfair in the absence of "a trial atmosphere that had been utterly corrupted by press coverage." *Id.* at 798, 95 S.Ct. at 2035.

"Qualified jurors need not, however, be totally ignorant of the facts and issues involved." *Id.* at 799–80, 95 S.Ct. at 2036. In *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), the Court stated:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 723, 81 S.Ct. at 1642–43 (citations omitted).

In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), the Court observed: "[i]n the overwhelming majority of criminal cases, pretrial publicity presents few unmanageable threats to this important right [of a fair trial before an impartial jury]."

In *Stroble v. California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1952), the claim was a denial of due process because of pretrial publicity including the prosecutor's release of the defendant's recorded confession. The court denied relief and noted that the publicity "had receded" some six weeks before trial.

ii.

Change of venue is addressed to the sound discretion of the trial court, and

> [t]here is a presumption that a defendant can receive a fair trial from the citizens of the county or city in which the offense occurred. To overcome this presumption, the accused has the burden of clearly showing "that there is such a widespread feeling of prejudice on the part of the citizenry as will be reasonably certain to prevent a fair and impartial trial."

Stockton v. Virginia, 227 Va. 124, 314 S.E.2d 371, 379–80 (1984), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984) (citation omitted).

In the appeal in *Tuggle I*, the defendant claimed error because of the refusal to change the venue out of Smyth County. The Supreme Court of Virginia found that there was no abuse of discretion by the trial judge and found as a fact "nothing in the record suggests that there was widespread prejudice against Tuggle in Smyth County." *Tuggle I*, 323 S.E.2d at 545. This case is a collateral attack upon a state conviction and is governed by 28 U.S.C. § 2254(d), which provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, *shall be presumed to be correct*, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, *the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.*

(Emphasis added).

[8] The district court has failed to follow the clear language and the procedures set forth in this federal statute. The Supreme Court of Virginia has found as a fact that there was not a widespread prejudice against Tuggle in Smyth County so as to require a change of venue. This finding is presumed to be correct and is binding on the federal district court unless the court finds one of the circumstances set forth in § 2254(d)(1)–(7).

The district court did not acknowledge the existence of § 2254(d) or the presumption of correctness of the state court finding, and the district court made no effort to face up to or explain away these facts under one of the eight circumstances outlined in the statute. In *Sumner v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982), the Court stated:

> Of course, the federal courts are not necessarily bound by the state court's findings. Section 2254(d) permits a federal court to conclude, for example, that a state finding was "not fairly supported by the record." But the statute does require the federal courts to face up to any disagreement as to the facts and to defer to the state court unless one of the factors listed in § 2254(d) is found. Although the distinction between law and fact is not always easily drawn, we deal here with a statute that requires the federal courts to show a high measure of deference to the factfindings made by the state courts. To adopt the Court of Appeals' view would be to deprive this statutory command of its important significance.

Id. at 597–98, 102 S.Ct. at 1307.

On the record, Tuggle has presented no convincing evidence that the state court findings are erroneous, and the district court clearly erred in finding that the trial jury was prejudiced or biased against Tuggle because of pretrial publicity or that the trial judge abused his discretion in not changing the venue.

iii.

The district court found that three members of the jury had been contacted, prior to trial and prior to being drawn as jurors on Tuggle's case, by members of the media concerning their decision as jurors in a case tried earlier at the same term of court. The district court concluded that these contacts together with the trial judge's refusal to allow Tuggle's counsel adequate individualized and sequestered voir dire, and the failure of the trial judge to allow challenges for cause outside the presence of the panel deprived Tuggle of his constitutional right to an impartial jury.

As to individual and sequestered voir dire, the trial judge advised, "We will examine the jurors in the normal way ... on voir dire. You may ask the panel as a whole questions and then if you desire to question any one individually, you may proceed in that fashion."

During the selection of the jury, the judge asked the venire whether any had formed an opinion about the case because of pretrial publicity. Eight persons answered in the affirmative and were immediately excused by the court. Replacement jurors were summonsed, and after questioning, all 20 stated they had formed no opinion about the case and would impartially decide the case based solely on the evidence presented in court. Tuggle's counsel then asked the panel, "How many of you have been contacted by a representative of a newspaper either in person or by telephone as a result of your service in [the unrelated] case." Four persons raised their hand and counsel inquired what the reporter had asked them. The court ruled, "That's another matter. You may quiz them on this particular case." Tuggle did not proffer what questions he wished to ask or what information he anticipated he would receive from these prospective jurors about media contacts in another case and how this would influence his selection of jurors in the Tuggle case. Counsel then asked content questions of each juror who had read something about the case, but this produced no disqualifying information. Some jurors were skeptical of what they had read, others could not recall what they had read and none had formed an opinion about Tuggle's case. All jurors indicated that they had not heard any comments about Tuggle's case by the Commonwealth's attorney or any law enforcement agent.

Tuggle's attorney then asked to make his challenges for cause outside the presence of the panel, but the judge stated the panel was qualified on the basis of the voir dire examination and advised counsel that he could question the panel further if he desired. Counsel never proffered the names of the jurors he wished to challenge for cause or the specific grounds therefore, had he been allowed to do so out of the presence of the entire panel. Counsel then advised that he had no further questions, and the attorneys proceeded with peremptory strikes.

In *Tuggle I*, the Supreme Court of Virginia found that, "each member of the panel was disinterested, had not expressed or formed any opinion regarding Tuggle's guilt or innocence, was not sensible of any bias or prejudice, and stood indifferent in the cause." 323 S.E.2d at 546. In *Tuggle I*, the court also found that counsel did not have the right to examine each venireman out of the presence of the others, but such procedure was committed to the discretion of the trial judge, and the Supreme Court of Virginia found no abuse of discretion in denying this motion.

Tuggle's counsel was not prevented from proceeding with voir dire of the venire, but he has not proffered to us nor did he proffer to the Supreme Court of Virginia what questions he would have asked the veniremen if he could have examined them individually and out of the presence of the remainder of the panel.

[9, 10] The Virginia Supreme Court held that counsel should have been afforded the opportunity to challenge the jurors for cause out of the presence of the panel, but again he did not proffer to that court or to the federal court which prospective jurors would have been challenged or the basis for such challenge. This failure by the trial judge was not reversible error. If there was a violation of Virginia state law on this point, it does not support federal habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 67, 112 S.Ct. 475, 479–80, 116 L.Ed.2d 385 (1991). There is no constitutional right to be allowed to challenge for cause outside the presence of the panel.

[11] As to the contacts of media representatives with four jurors concerning a prior case not involving Tuggle, the record shows that only one of these actually sat on Tuggle's jury. In view of our opinion in *Wells v. Murray*, 831 F.2d 468 (4th Cir.1987), we do not find that a news reporter's contact of a juror about his decision in a prior case had any adverse effect upon Tuggle. It is the defendant's duty to show a strong possibility of jury bias as a result of this contact, and this has not been done. In *Wells*, the venire included several jurors who had been criticized by a trial judge for returning an acquittal in a prior, unrelated case. We held that this did not represent constitutional error or prevent the jury from being impartial because the judge's comments did not relate to the defendant, but to a defendant in a prior case. The same is true here. The inquiry concerned not Tuggle but a defendant in a prior unrelated case. There has been no showing that this one juror was biased against the defendant or in any way affected by the media contact.

The district court's reliance on *Stockton v. Virginia*, 852 F.2d 740 (4th Cir.1988), is misplaced. The jurors in *Stockton* were contacted during their deliberations and the contact was about the case they were deliberating. The contact in the present case was prior to trial and did not involve Tuggle's case.

[12] It is not sufficient to allege that voir dire was inadequate and as a result Tuggle was denied an impartial jury. The burden is upon Tuggle to demonstrate a strong possibility of jury bias. *Wells*, 831 F.2d at 473. On appeal, a court cannot determine that voir dire was inadequate unless the complaining party has proffered to the trial court, and preserved for appeal, those questions he would have asked to the venire.

The district court erred in granting the writ on the ground that the trial jury was not impartial because of the conduct of the trial judge and the prosecution. This is true whether the claims are considered individually or collectively.

C.

The district court found the evidence that was produced cannot show guilt beyond a reasonable doubt under the elements of the crime of rape as defined and applied by the Virginia courts. In this case, there was no semen in the vagina. There were small bruises found *outside* the vagina, but there were no injuries found in the vagina and there was no testimony concerning when the bruises occurred. The state pathologist testified that the bruises could have been caused by penetration of "something, a penis, a finger, an object, something." With such evidence, no rational fact-finder could have found proof beyond a reasonable doubt. That the jury found rape in this case is most likely explained by the inaccurate pre-trial information concerning other rapes supposedly committed by Tuggle, as well as the public pressure surrounding this notorious case, which was heightened by press contacts with jurors, prior to trial. The court grants the petitioner's petition for habeas relief on this ground.

The district court mentioned *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), but seems to have paid little heed to this holding. In *Jackson*, the court stated:

> We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof beyond a reasonable doubt.
>
> ....
>
> ... Under the standard established in this opinion as necessary to preserve the due process protection recognized in *Winship*, a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.

Id. at 324, 326, 99 S.Ct. at 2791–92, 2793.

It is obvious that the district judge substituted his view of the facts for that of the twelve person jury which heard the testimony and observed the witnesses and was in a much better position to decide this issue under the correct instruction of the state trial judge on the issue of rape under Virginia law. Also, the Supreme Court of Virginia found the evidence of penetration sufficient to satisfy Virginia law on the question of penetration. *Tuggle I*, 323 S.E.2d at 550.

[13] Virginia law is well established that to prove rape, the evidence must establish

beyond a reasonable doubt that an accused has had sexual intercourse with a female by force and against her will and that there was an actual penetration to some extent of the male sexual organ into the female sexual organ. *McCall v. Virginia*, 192 Va. 422, 65 S.E.2d 540, 542 (1951). Penetration need only be slight. *Rowland v. Virginia*, 147 Va. 636, 136 S.E. 564, 565 (1927).

[14] When the sufficiency of evidence is challenged on appeal, the evidence and all reasonable inferences fairly drawn therefrom must be viewed in the light most favorable to the prosecution. This is the teaching of *Jackson*, which case does not allow a federal judge to substitute his own subjective determination of guilt or innocence for that of the factfinder.

> The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known.

Jackson, 443 U.S. at 319–20 n. 13, 99 S.Ct. at 2789 n. 13.

In *Elam v. Virginia*, 229 Va. 113, 326 S.E.2d 685 (1985), the Virginia Supreme Court held:

> Penetration by a penis of a vagina is an essential element of the crime of rape; proof of penetration, however slight the entry may be, is sufficient; evidence of ejaculation is not required; and no hypothesis that penetration was accomplished by some other object other than a penis is sufficient to reverse a conviction unless it reasonably flows from the evidence itself rather than the imagination of counsel.

Id. at 686–87.

[15] The evidence of rape presented against Tuggle established that when the body of the victim was discovered, her blouse was pulled up to her armpits, her pants were down around her knees, her panties were rolled down somewhat with part of her pantyhose protruding from the top of her pants and one of her legs out of the pantyhose. There was a bite mark present on the lower inner quadrant of the right breast and a large bruise measuring three and one-half by two inches on the upper inner thigh. Examination of the vagina and the perineal areas showed some contusions of the vaginal vault at the posterior aspect and near the bottom. There were "contusions to the posterior fornix of the vagina which is inside the labia majora.... There were reddish bruises at the posterior aspects of the vagina.... The bruises of the vagina indicate penetration of the vaginal vault by something, a penis, a finger, an object or something." Swabs from the vagina were negative for semen and spermatozoa, but semen was present in the rectum.

With this evidence, it was for the jury to say whether Tuggle's penis, his finger, or some other object penetrated the victim's vagina. Tuggle's penis was obviously in the area, as evidenced by the semen in the rectum, and considering the evidence as a whole, it was sufficient to prove penetration and rape under Virginia law. The district court was clearly erroneous in finding that "[t]here were no injuries found in the vagina." The doctor testified, "[t]here were reddish bruises at the posterior aspects of the vagina.... The bruises of the vagina indicate penetration of the vaginal vault."

The district court was clearly erroneous in finding that no rational factfinder could find proof beyond a reasonable doubt of rape on the evidence. The court explained this by saying that the jury most likely was influenced by inaccurate pretrial information concerning other rapes committed by Tuggle as well as public pressure "heightened by press contact with jurors." This is pure speculation and is not supported by the record. As we have explained above, only one of the jurors sitting on the case had been contacted by the press, and this related not to Tuggle but to another case. The information concerning other rapes had occurred months before in newspapers which some of the jurors had read; however, most had forgotten and all had agreed that they could judge the case fairly and impartially based only upon the evidence presented in court.

[16] On this issue, the district court again failed to give any deference to the findings of fact by the state trial and appellate courts or give such findings the presumption of correctness to which they are entitled under *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). When a federal habeas court reviews a state conviction:

> [t]he court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made. If it has, the finding must be presumed correct by virtue of 28 U.S.C. § 2254(d), *see Sumner v. Mata*, 449 U.S. 539 [101 S.Ct. 764, 66 L.Ed.2d 722] (1981), and unless the habeas petitioner can bear the heavy burden of overcoming the presumption, the court is obliged to hold that the Eighth Amendment as interpreted in *Enmund* is not offended by the death sentence.

Id. at 387–88, 106 S.Ct. at 697–98 (footnotes omitted). The presumption of correctness applies to facts by appellate courts as well as trial courts. *Sumner*, 449 U.S. at 545–47, 101 S.Ct. at 768–69.

The district court's granting of the writ on the ground that evidence was insufficient to prove rape was clearly erroneous and is reversed.

D.

The district court found that the vileness instruction given to the jury was unconstitutionally vague. This instruction was as follows:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> (1) That, after consideration of his past criminal record, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> (2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all of the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.
>
> If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.
>
> The court instructs the jury that even if you find, beyond a reasonable doubt, after considering the prior history of the defendant, that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or find beyond a reasonable doubt that his conduct in committing the offense was outrageously and wantonly vile, horrible or inhuman in that it involved depravity of mind or aggravated battery to the deceased, then you still are not required to recommend the death sentence, but you are permitted, even under those circumstances to recommend life imprisonment.

The trial judge refused Tuggle's requested jury instruction that read as follows:

> The court instructs the jury that the words depravity of mind mean a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.
>
> The words aggravated battery mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish the act of murder.

The district court refused to find Virginia's vileness aggravating circumstance, Va.Code Ann. § 19.2-264.2, so vague and standardless as to be unconstitutional, but it found that strong arguments as to its invalidity had

been made and "the court declines to hold the statute unconstitutional, especially since so many other constitutional violations are present in this case which mandate that the petition for writ of habeas corpus be granted."

In *Tuggle I*, the Virginia Supreme Court held that there was no error in the trial judge's refusal to give the requested instruction that defined "depravity of mind" and "aggravated battery." As to vileness, the court stated:

> We need not review again the evidence surrounding this heinous crime. Manifestly, it was outrageously vile and involved depravity of mind. Further, the battery to the victim was aggravated and "more culpable than the minimum necessary to accomplish an act of murder." *Smith*, 219 Va. at 478, 248 S.E.2d at 149.

Id. at 554.

The district court held that:

> Respondents argue that the vagueness of Virginia's "vileness" aggravator was rejected by the Virginia Supreme Court in this case, *see* 228 Va. at 515–16, 323 S.E.2d at [5]52–53, and has also been repeatedly rejected by the Fourth Circuit Court of Appeals in earlier cases. The cases respondents rely upon for this proposition are inapposite. In those cases, the judge gave a limiting instruction to the Virginia statutory definition of "vileness." *See, e.g., Turner v. Bass*, 753 F.2d 342, 352 (1985), *rev'd on other grounds*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). In this case, no limiting instruction was given. Instead, despite petitioner's requests, only the "vileness" definition which the United States Supreme Court had already found to be unconstitutional was provided to the jury. *See Godfrey v. Georgia*, 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). Because there is a greater need for reliability in the determination that death is the appropriate punishment in a specific case, *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976), it was error for the trial court to refuse to provide limiting instructions.

The district court obviously misread *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the prior decisions of our court, and the instruction given to Tuggle's jury on the issue of vileness. The district court found that the instruction contained no limitation on the statutory definition of vileness, but the statutory definition was limited in the charge by the additional words "beyond the minimum necessary to accomplish the act of murder." We found in *Boggs v. Bair*, 892 F.2d 1193 (4th Cir.1989), *cert. denied*, 495 U.S. 940, 110 S.Ct. 2193, 109 L.Ed.2d 521 (1990), that this charge was constitutionally acceptable.

In *Godfrey*, the Supreme Court was dealing with the Georgia aggravating factor of vileness which required that the offense "was outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravating battery to the victim." The court found that Godfrey's crimes were no more depraved than that of any murder, there was no evidence of torture, the victims were killed instantly and Godfrey was acting under "extreme emotional trauma." The court held that the vague language of the vileness factor had not been given a constitutional construction by the Georgia Supreme Court. 446 U.S. at 432–33, 100 S.Ct. at 1767.

[17] Tuggle's jury instruction included the additional limitation that the "aggravated battery to the victim was beyond the minimum necessary to accomplish the act of murder," which is a paraphrase of the language limiting vileness in *Smith v. Virginia*, 219 Va. 455, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979) ("Battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish the act of murder."). We find the instruction given to Tuggle's jury was not unconstitutionally vague as to vileness, and the limiting language approved by the Virginia Supreme Court and paraphrased in the present charge was sufficient to clarify the meaning of vileness and avoid the *Godfrey* problem. Unlike *Godfrey*, the present facts also demonstrate aggravated battery more than necessary to accomplish the act of murder in the biting of the victim's breast, the numerous bruises and contusions and the sodomy inflicted upon her.

Although the charge given to Tuggle's jury did not contain the "qualitatively and quantitatively more culpable" language, this omission did not create unconstitutional vagueness, because the vital part of the limitation is "beyond the minimum necessary to accomplish the act of murder." Qualitative and quantitative relate to the extent of the battery being more than necessary to accomplish the murder.

Godfrey held that the jury must be adequately guided so as to distinguish between "'the few cases in which [the penalty] is imposed from the many cases in which it is not.'" 446 U.S. at 427, 100 S.Ct. at 1764 (citation omitted) (alteration in original). The charge given to Tuggle's jury made this distinction.

[18] The purpose of having aggravating circumstances in a capital case is to narrow the class of persons who may receive the ultimate penalty. This is explained by the court in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988):

> To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 [103 S.Ct. 2733, 2742, 77 L.Ed.2d 235] (1983); c.f. *Gregg v. Georgia*, 428 U.S. 153 [96 S.Ct. 2909, 49 L.Ed.2d 859] (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. *Id.* at 162–164 [96 S.Ct. at 2920–21] (reviewing Georgia sentencing scheme); *Proffitt v. Florida*, 428 U.S. 242, 247–250 [96 S.Ct. 2960, 2964–65, 49 L.Ed.2d 913] (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows a class of persons eligible for the death penalty according to an objective legislative definition. *Zant*, *supra*, [462 U.S.] at 878 [103 S.Ct. at 2743] ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

In *Zant v. Stephens*, *supra*, we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body into exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Id.*, at 874 [103 S.Ct. at 2741]. We found no constitutional deficiency in that scheme because the aggravating circumstances did all that the Constitution requires.

The use of "aggravating circumstances" is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channelling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in *Jurek v. Texas*, 428 U.S. 262 [96 S.Ct. 2950, 49 L.Ed.2d 929] (1976), establishes this point.

Id. 484 U.S. at 244, 108 S.Ct. at 554.

In Virginia, the narrowing is accomplished at the guilt stage under the limited definitions of capital murder in Va.Code Ann. § 18–2–31 and at the sentencing stage under Va.Code Ann. § 19.2–264.2. Since there is narrowing in both phases of the trial, the Constitution does not require an exhaustive definition of an aggravating circumstance. *Lowenfield* explains this:

> Here, the "narrowing function" was performed by the jury at the guilt phase when it found the defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance du-

plicated one of the elements of the crime does not make this sentence constitutionally infirm.

484 U.S. at 246, 108 S.Ct. at 555.

Since under Virginia law the "narrowing" is accomplished at both the guilt and sentencing stage, a defendant is given double protection and more than the Constitution requires.

Our court has found essentially the same charge on vileness not to be unconstitutionally vague. *See Bunch v. Thompson*, 949 F.2d 1354 (4th Cir.1991), *cert. denied*, — U.S. ——, 112 S.Ct. 3056, 120 L.Ed.2d 922 (1992), and *Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985). We reverse the district court's holding the jury instruction on vileness to be unconstitutionally vague.

E.

We have ruled in Section A hereof that the Virginia Supreme Court did not err in upholding Tuggle's sentence on the aggravating circumstance of vileness, after it set aside the finding on the aggravating circumstance of future dangerousness. This effectively disposes of the other grounds upon which the district court granted relief: failure of the district court to appoint an independent psychiatrist to assist the defense and in allowing Dr. Arthur Centor to testify about Tuggle's future dangerousness. *See Fisher v. Virginia*, 236 Va. 403, 374 S.E.2d 46 (1988), *cert. denied*, 490 U.S. 1028, 109 S.Ct. 1766, 104 L.Ed.2d 201 (1989) and *Payne v. Virginia*, 233 Va. 460, 357 S.E.2d 500 (1987), *cert. denied*, 484 U.S. 933, 108 S.Ct. 308, 98 L.Ed.2d 267 (1987).

Future dangerousness is no longer a part of the case and Tuggle's penalty is now based solely upon his conviction of capital murder with the aggravating circumstance of vileness.

Having found that the district court was in error in granting the petitioner a writ of habeas corpus, we reverse and remand this case to the district court with instructions to dismiss the petition.

REVERSED AND REMANDED WITH INSTRUCTIONS.

UNITED STATES of America, Plaintiff-Appellee,

v.

Doyle Marshall WILLEY, Sr., Defendant-Appellant.

No. 93-2930.

United States Court of Appeals, Fifth Circuit.

June 27, 1995.

Chapter 7 debtor was convicted of bankruptcy fraud, conspiracy to commit bankruptcy fraud, aiding and abetting making of false statement on loan application, aiding and abetting concealment of assets from RTC and FDIC, and aiding and abetting money laundering after trial in the United States District Court for the Southern District of Texas, Ewing Werlein, Jr., J. Defendant appealed, and the Court of Appeals, Garwood, Circuit Judge, held that: (1) jury could find that Chapter 7 debtor had intent to commit bankruptcy fraud and to conceal assets from RTC and FDIC; (2) jury could find that debtor aided and abetted the making of a false statement on a loan application; (3) jury could find that debtor committed offense of money laundering with respect to five out of six financial transactions involving debtor; (4) evidence was insufficient to find that debtor committed offense of money laundering with respect to check issued to debtor's girlfriend from her brokerage account and deposited by her into one of her personal checking accounts; (5) admission of IRS agent's expert testimony was not abuse of discretion; (6) personal items seized during search of property owned by corporation that was set up by debtor were admissible; (7) debtor was properly sentenced under money

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED:
August 2, 1995

No. 94-4005

LEM DAVIS TUGGLE,

Plaintiff-Appellee,

versus

C. E. THOMPSON, Warden,

Defendant-Appellant.

O R D E R

Tuggle filed, on August 1, 1995, a motion to stay the issuance of our mandate in this case and, as well, a motion to stay his execution which has been set by order of the Circuit Court of Smyth County, Virginia for September 21, 1995. Our decision in this case was filed on June 29, 1995, and rehearing was denied on July 25, 1995. Tuggle represents to us that he wishes to file a petition for certiorari in the Supreme Court of the United States for review of our decision.

We are of opinion that Tuggle's motions are well taken.

It is accordingly ADJUDGED and ORDERED that the mandate of this court in this case shall be, and the same hereby is, stayed for a period of 30 days, pursuant to F.R.A.P. 41(b) in order that Tuggle may file his petition for certiorari in the Supreme Court of the United States.

It is FURTHER ADJUDGED and ORDERED that Tuggle's execution date shall be, and the same hereby is, stayed until the further order of this court.

With the concurrence of Judge Chapman.

H. E. Widener, Jr.
For the Court

Judge Hamilton did not participate in the decision on the above-mentioned motions. This order is filed by a quorum of the panel under 28 U.S.C. § 46(d).

A True Copy, Teste:
Bert M. Montague, Clerk
BY _____
Deputy Clerk

EXHIBIT D

ORDER LIST

THURSDAY, SEPTEMBER 21, 1995

ORDER IN PENDING CASE

95-6016 (A-270) LEM DAVIS TUGGLE V. J. D. NETHERLAND, WARDEN

The application for stay of execution of sentence of death presented to the Chief Justice and by him referred to the Court is granted pending the disposition by this Court of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

SUPREME COURT OF THE UNITED STATES

No. A-209

J. D. NETHERLAND, WARDEN *v.* LEM DAVIS TUGGLE

ON APPLICATION TO VACATE STAY OF EXECUTION

[September 14, 1995]

PER CURIAM.

Applicant asks that we vacate a stay of execution granted Tuggle by the Court of Appeals for the Fourth Circuit. Because we agree with applicant that the stay was improvidently entered, we grant his application to vacate, provided that the stay shall remain in effect until September 20, 1995, to allow Tuggle's counsel opportunity to seek a further stay in this Court.

On June 29, 1995, the Court of Appeals issued an opinion vacating the District Court's grant of habeas relief, finding all of Tuggle's constitutional claims to be without merit. *Tuggle* v. *Thompson*, 57 F. 3d 1356. The court stayed the issuance of its mandate on August 2, however, and granted Tuggle a 30-day stay of execution pending the filing of a timely petition for certiorari in this Court; then on August 25 it extended the stay of execution for the full 90 days allowed to file a certiorari petition in this Court.

Both actions of the court were taken by summary order without opinion or discussion. Nothing indicates that the Court of Appeals even attempted to undertake the three-part inquiry required by our decision in *Barefoot* v. *Estelle*, 463 U. S. 880, 895–896 (1983). See also *Maggio* v. *Williams*, 464 U. S. 46, 48 (1983) (*per curiam*); *Autry* v. *Estelle*, 464 U. S. 1, 2–3 (1983) (*per curiam*). There is no hint that the court found that

"four Members of th[is] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" or that "a significant possibility of reversal" existed. *Barefoot*, *supra*, at 895. We think the inescapable conclusion is that the Court of Appeals mistakenly believed that a capital defendant as a matter of right was entitled to a stay of execution until he has filed a petition for certiorari in due course. But this view was rejected in *Autry*, *supra*, at 2, and *Maggio*, *supra*, at 48.

Accordingly, the application to vacate the stay of execution is granted.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

Because there is no support in the record for the conclusion that the Court of Appeals abused its discretion when it granted a stay of execution to enable respondent Tuggle to file a petition for certiorari, I respectfully dissent. The fact that the respondent has substantial grounds for challenging the constitutionality of his death sentence is demonstrated both by the issuance of a writ of habeas corpus by the District Court and by the 19-page opinion filed by the Court of Appeals. *Tuggle* v. *Thompson*, 57 F.3d 1356 (CA4 1995). Promptly after that opinion was announced, respondent filed a motion for a stay of execution supported by an explanation of why "the three-part inquiry," *ante*, at 1, described in *Barefoot* v. *Estelle*, 463 U. S. 880, 895–896 (1983), warranted that relief. It is disrespectful to the Court of Appeals to assume that its grant of that motion did not implicitly endorse the reasoning in respondent's moving papers.

The stay of execution would merely have given respondent the opportunity to seek the review in this Court that has been authorized by Congress and our Rules. In my opinion it is both unwise and unfair to require a death row inmate who has acted diligently at all stages of his litigation to prepare and file a petition

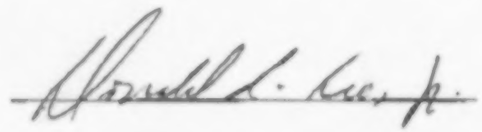
raising substantial claims more promptly than other litigants. I would deny the warden's application.

JUSTICE SOUTER would deny the application to vacate stay of execution.

JUSTICE BREYER, for reasons stated in the first paragraph of JUSTICE STEVENS' dissent, votes to deny the application.

Certificate of Service

I hereby certify that, pursuant to Supreme Court Rule 29, I had a copy of the foregoing Petitioner's Reply Brief hand-delivered to Donald R. Curry, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219 on this 20th day of September, 1995.



IN THE SUPREME COURT OF THE UNITED STATES

LEM DAVIS TUGGLE, JR.,	)	
	)	
Petitioner,	)	
	)	**October Term, 1994**
vs.	)	**Record No.**
	)	
J. D. NETHERLAND, WARDEN,	)	

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Lem Davis Tuggle, asks leave to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39 of the Rules of the Supreme Court of the United States. Petitioner has previously been granted leave to so proceed in the United States District Court for the Western District of Virginia, by Order dated September 25, 1992 (Order attached hereto as Exhibit 1). Timothy M. Kaine and Helen L. Konrad were appointed as counsel by the District Court pursuant to 21 U.S.C. § 848(q)(4). (Order attached as Exhibit 2).

Respectfully Submitted,

LEM DAVIS TUGGLE, JR.

By: _____

Timothy M. Kaine
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EDITOR'S NOTE

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CAPITAL CASE
EXECUTION DATE: 21 Sept.

No. 95-6016
A-[illegible]

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LEM DAVIS TUGGLE,

Petitioner,

v.

J. D. NETHERLAND, WARDEN,

Respondent.

WARDEN'S REPLY

In his reply brief, petitioner relies upon Virginia Code § 19.2-169.7. According to Tuggle, under that statute nothing he said during the competency or sanity evaluation could be used against him. (Pet. Reply at 3).

Tuggle clearly misreads the statute. By its own language, the statute applies only to a defendant's "statement or disclosure...*concerning the alleged offense*." Va. Code § 19.2-169.7 (emphasis added) (copy appended). Although the record shows that Dr. Centor interviewed Tuggle, there is no evidence that Tuggle made any statements or disclosures about the alleged offense or, if he did, that the expert's opinion regarding "future dangerousness" was based upon such statements. In fact, Dr. Centor testified that his interview with Tuggle "related to his past history and various other matters." (Resp. App. 37).

Just as importantly, the statute says such statements cannot be used "at trial" unless the defendant put his mental state "at the time of the offense" in issue by filing a notice of an intent to raise an insanity defense pursuant to § 19.2-168. Clearly, then, what the statute contemplates

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is barring the use of a defendant's statements about the offense against him "at trial" on the issue of guilt. Indeed, that § 19.2-169.7 never was intended to apply to capital sentencing proceedings is evidenced not only by its title ("Disclosure by defendant during evaluation or treatment; use ***at guilt phase*** of trial") but by the fact that in 1986 -- two years *after* Tuggle's trial -- the Virginia Legislature enacted § 19.2-264.3:1G, which specifically governs the admissibility at capital sentencing proceedings of a defendant's statements made during a pretrial mental evaluation. Obviously, if § 19.2-169.7 meant what Tuggle says it does, the enactment of § 19.2-264.3:1G would have been unnecessary.

Respectfully submitted,

J. D. NETHERLAND, WARDEN

By: _____
Counsel

Donald R. Curry
Senior Assistant Attorney General
Bar No. 16594
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, a copy of the foregoing Warden's Reply was faxed to the offices of Timothy M. Kaine, Mezullo and McCandlish, 1111 East Main Street, Suite 1500, Richmond, VA 23219, counsel for petitioner.

_____
Donald R. Curry
Senior Assistant Attorney General

§ 19.2-168. Notice to Commonwealth of intention to present evidence of insanity; continuance if notice not given. — In any case in which a person charged with a crime intends (i) to put in issue his sanity at the time of the crime charged and (ii) to present testimony of an expert to support his claim on this issue at his trial, he, or his counsel, shall give notice in writing to the attorney for the Commonwealth, at least twenty-one days prior to his trial, of his intention to present such evidence. In the event that such notice is not given, and the person proffers such evidence at his trial as a defense, then the court may in its discretion, either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence. The period of any such continuance shall not be counted for speedy trial purposes under § 19.2-243. (Code 1950, § 19.1-227.1; 1970, c. 336; 1975, c. 495; 1986, c. 535.)

§ 19.2-169.7. Disclosure by defendant during evaluation or treatment; use at guilt phase of trial. — No statement or disclosure by the defendant concerning the alleged offense made during a competency evaluation ordered pursuant to § 19.2-169.1, a mental state at the time of the offense evaluation ordered pursuant to § 19.2-169.5, or treatment ordered pursuant to § 19.2-169.2 or § 19.2-169.6 may be used against the defendant at trial as evidence or as a basis for such evidence, except on the issue of his mental condition at the time of the offense after he raises the issue pursuant to § 19.2-168. (1982, c. 653.)

§ 19.2-264.3:1. Expert assistance when defendant's mental condition relevant to capital sentencing.

* * *

G. *Disclosure by defendant during evaluation or treatment; use at capital sentencing proceedings.* — No statement or disclosure by the defendant made during a competency evaluation performed pursuant to § 19.2-169.1, an evaluation performed pursuant to § 19.2-169.5 to determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or § 19.2-169.6 or a capital sentencing evaluation performed pursuant to this section, and no evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in § 19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense (1986, c. 535; 1987, c. 439.)

EDITOR'S NOTE

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(5)

No. 95-6016

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

LEM DAVIS TUGGLE, JR.,

Petitioner,

vs.

J. D. NETHERLAND, WARDEN

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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No. 95-6016

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

LEM DAVIS TUGGLE, JR.,

Petitioner,

v.

J. D. NETHERLAND, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY BRIEF

In reply to Respondent's Brief in Opposition[1], the Petitioner first offers the Commonwealth's own, earlier, words:

AKE v. OKLAHOMA REQUIRES THAT THE

[1]Petitioner does not concede that the points raised in Respondent's Brief in Opposition which are not expressly addressed in this Reply are properly raised at this juncture. Due to the exigencies inherent in the State's scheduled execution, Petitioner here responds only to the primary argument pressed by the Commonwealth.

DEFENDANT'S CASE BE REMANDED TO THE
CIRCUIT COURT OF SMYTH COUNTY FOR RESENTENCING

. . .

Because the Commonwealth introduced psychiatric testimony that the defendant presented a future danger, and because the defendant was not provided with an independent psychiatrist to attempt to rebut the testimony, the defendant's case would appear to be within the line of cases in which Ake mandates the appointment of an independent psychiatrist to assist the defendant in preparing for the sentencing phases of his trial. Accordingly, the Commonwealth submits that the defendant's case should be remanded to the Circuit Court of Smyth County for resentencing by a different jury.

. . .

The Commonwealth submits . . . under Ake v. Oklahoma, that the defendant should be resentenced . . . .

Brief on Behalf of the Commonwealth at 20-23. Tuggle v. Commonwealth, (Record No. 840486)(attached hereto).

This forthright, decade old, position of the Commonwealth sharply contrasts with its position in its Brief in Opposition. Today Respondent argues that there was no Ake violation in Petitioner's case,[2] and also, if there was, that Petitioner's unconstitutional death sentence did not "compel" relief for Petitioner before the Virginia Supreme Court. If, in the Respondent's 1986 words, there was an Ake violation and, "accordingly," and "because" of that violation, the Petitioner "should" be resentenced "because" relief was "REQUIRE(D)," Id., then Respondent's 1995 argument that the error was "harmless" and resentencing was not "compelled" rings

[2]In the Commonwealth's current words, the Ake violation it was compelled to recognize in 1986 is, today, "simply non-existent." Brief in Opposition, p. 11.

hollow.

Plainly, there was a violation of Ake. Tuggle was committed by the trial court to Central State Hospital to be evaluated pursuant to Va. Code Sec. 19.2-169.1 and 169.5. Those statutes allowed investigation to determine his competence to stand trial and his sanity at the time of the offense. Under Virginia law, nothing said by a defendant during such an evaluation can be introduced against the defendant "as evidence or as a basis for evidence" unless he puts his mental status at the time of the offense in issue. Va. Code Sec. 19.2-169.7.

Shortly before trial, the state examiners wrote to the Court indicating that they had completed the ordered investigation. The letter also stated that "[w]e have formed an opinion as to the issue of future dangerousness but we are not reporting it to the Court at this time because we were not requested to do so." App. 39.

After receiving this letter, Tuggle's counsel moved for the appointment of a defense psychiatrist. The motion, made because of the "seriousness of the charges heretofore lodged against the defendant," stated its purpose plainly:

> The undersigned have made arrangements with Dr. C. Robert Showalter, Blueridge Hospital, Box 100, Charlottesville, Virginia, to perform an evaluation and make unto the attorneys for the Defendant a report on the condition of the Defendant at the time of the alleged offenses herein and at the present time with regard to his capacity to understand the proceedings against him, and to assist in the defense of his trial.

App. 41. At oral argument on the motion, Tuggle's counsel indicated that they would pay for the examination on their own because of the Court's previous refusal to appoint any independent experts. App. 62. The trial court denied the motion. At trial, the state's "future dangerousness" evidence was introduced and argued vigorously by the prosecutor while Tuggle

was deprived of a response. App. 185-207, 220, 222-24

The motion clearly sought independent psychiatric assistance "to assist in the defense of [Tuggle's] trial." The Commonwealth argues now that asking directly for that assistance, and volunteering to pay for it, was not enough. According to the Commonwealth, while the defense asked for assistance at "trial," its failure to say "sentencing" or mention "future dangerousness" was a fatal error. The constitutional right announced in Ake v. Oklahoma is not so inconsequential as to evaporate over the minor wording difference pressed by the Commonwealth.

Finally, the Commonwealth asserts that Tuggle has not proffered any response to the State's psychiatric sentencing testimony. That, of course, is the proof of, not a defense to, the Ake violation. Accordingly, "Ake does not require a particular showing of prejudice . . . ." Buttrum v. Black, supra, 721 F. Supp. 1269, 1313 (N.D. Ga. 1989).[3] Furthermore, Tuggle's state and federal petitions asserted aspects of his mental history that would have been relevant to a properly appointed independent expert. The state habeas court dismissed Tuggle's petition without allowing the evidentiary hearing he requested and the District Court granted him habeas relief prior to ruling on his motion for an evidentiary hearing.

[3]The district court's opinion in Buttrum was described as "a very detailed and scholarly order," Buttrum v. Black, 908 F.2d 695 (11th Cir. 1990), and was affirmed and adopted by the United States Court of Appeals for the Eleventh Circuit. The Commonwealth belittles the significance of Buttrum because it is "merely a one-paragraph, per curiam opinion," Brief in Opposition at 14, but the one paragraph plainly makes the district court opinion Eleventh Circuit law.

Respectfully Submitted,

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SUPREME COURT OF THE UNITED STATES

LEM DAVIS TUGGLE, JR. *v.* J. D. NETHERLAND, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95–6016. Decided October 30, 1995

PER CURIAM.

In *Zant* v. *Stephens*, 462 U. S. 862 (1983), we held that a death sentence supported by multiple aggravating circumstances need not always be set aside if one aggravator is found to be invalid. *Id.*, at 886–888. We noted that our holding did not apply in States in which the jury is instructed to weigh aggravating circumstances against mitigating circumstances in determining whether to impose the death penalty. *Id.*, at 874, n. 12, 890. In this case, the Virginia Supreme Court and the Court of Appeals for the Fourth Circuit construed *Zant* as establishing a rule that in nonweighing States a death sentence may be upheld on the basis of one valid aggravating circumstance, regardless of the reasons for which another aggravating factor may have been found to be invalid. Because this interpretation of our holding in *Zant* is incorrect, we now grant the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari and vacate the judgment of the Court of Appeals.

I

Petitioner Tuggle was convicted of murder in Virginia state court. At his sentencing hearing, the Commonwealth presented unrebutted psychiatric testimony that petitioner demonstrated "'a high probability of future dangerousness.'" *Tuggle* v. *Commonwealth*, 230 Va. 99, 107, 334 S.E. 2d 838, 844 (1985), cert. denied, *Tuggle* v.

Virginia, 478 U. S. 1010 (1986). After deliberations, the jury found that the Commonwealth had established Virginia's two statutory aggravating circumstances, "future dangerousness" and "vileness"; it exercised its discretion to sentence petitioner to death.[1] 230 Va., at 108–109, 334 S.E. 2d, at 844–845.

Shortly after the Virginia Supreme Court affirmed petitioner's conviction and sentence, *Tuggle* v. *Commonwealth*, 228 Va. 493, 323 S.E. 2d 539 (1984), we held in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), that when the prosecutor presents psychiatric evidence of an indigent defendant's future dangerousness in a capital sentencing proceeding, due process requires that the State provide the defendant with the assistance of an independent psychiatrist. *Id.*, at 83–84. Because petitioner had been denied such assistance, we vacated the State Supreme Court's judgment and remanded for further consideration in light of *Ake*. *Tuggle* v. *Virginia*, 471 U. S. 1096 (1985).

On remand, the Virginia Supreme Court invalidated the future dangerousness aggravating circumstance because of the *Ake* error. See *Tuggle* v. *Commonwealth*, 230 Va., at 108–111, 334 S.E. 2d, at 844–846. The court nevertheless reaffirmed petitioner's death sentence, reasoning that *Zant* permitted the sentence to survive on the basis of the vileness aggravator. *Id.*, at 110–111, 334 S.E. 2d, at 845–846. The Court of Appeals agreed with this analysis on federal habeas review, *Tuggle* v. *Thompson*, 57 F. 3d 1356, 1362–1363 (CA4 1995), as it

[1]Virginia's capital punishment statute involves a two-stage determination. The jury first decides whether the prosecutor has established one or both of the statutory aggravating factors. Va. Code Ann. §19.2–264.4(C)-(D) (1995). If the jury finds neither aggravator satisfied, it must impose a sentence of life imprisonment. *Ibid.* If the jury find one or both of the aggravators established, however, it has full discretion to impose either a death sentence or a sentence of life imprisonment. *Ibid.*

had in the past.[2] Quoting the Virginia Supreme Court, the Court of Appeals stated:

> "'When a jury makes separate findings of specific statutory aggravating circumstances, any of which could support a sentence of death, and one of the circumstances subsequently is invalidated, the remaining valid circumstance, or circumstances, will support the sentence.'" *Id.*, at 1363 (quoting 230 Va., at 110 and citing *Zant*, *supra*).

II

Our opinion in *Zant* stressed that the evidence offered to prove the invalid aggravator was "properly adduced at the sentencing hearing and was fully subject to explanation by the defendant." 462 U. S., at 887. As we explained:

> "[I]t is essential to keep in mind the sense in which [the stricken] aggravating circumstance is 'invalid.' . . . [T]he invalid aggravating circumstance found by the jury in this case was struck down . . . because the Georgia Supreme Court concluded that it fails to provide an adequate basis for distinguishing a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed. The underlying evidence is nevertheless fully admissible at the sentencing phase." *Id.*, at 885–886 (internal citations omitted).

Zant was thus predicated on the fact that even after elimination of the invalid aggravator, the death sentence rested on firm ground. Two unimpeachable aggravating factors remained and there was no claim that inadmissible evidence was before the jury during its sentencing deliberations or that the defendant had been precluded from adducing relevant mitigating evidence.

[2]See *Smith* v. *Procunier*, 769 F. 2d 170, 173 (CA4 1985).

In this case, the record does not provide comparable support for petitioner's death sentence. The *Ake* error prevented petitioner from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation. As a result, the Commonwealth's psychiatric evidence went unchallenged, which may have unfairly increased its persuasiveness in the eyes of the jury. We may assume, as the Virginia Supreme Court and Court of Appeals found, that petitioner's psychiatric evidence would not have influenced the jury's determination concerning vileness. Nevertheless, the absence of such evidence may well have affected the jury's ultimate decision, based on all of the evidence before it, to sentence petitioner to death rather than life imprisonment.

Although our holding in *Zant* supports the conclusion that the invalidation of one aggravator does not necessarily *require* that a death sentence be set aside, that holding does not support the quite different proposition that the existence of a valid aggravator always excuses a constitutional error in the admission or exclusion of evidence. The latter circumstance is more akin to the situation in *Johnson* v. *Mississippi*, 486 U. S. 578 (1988), in which we held that *Zant* does not apply to support a death sentence imposed by a jury that was allowed to consider materially inaccurate evidence, *id.*, at 590, than to *Zant* itself. Because the Court of Appeals misapplied *Zant* in this case, its judgment must be vacated.

III

Having found no need to remedy the *Ake* error in petitioner's sentencing, the Virginia Supreme Court did not consider whether, or by what procedures, the sentence might be sustained or reimposed; and neither the state court nor the Court of Appeals addressed whether harmless-error analysis is applicable to this case. Because this Court customarily does not address such an issue in the first instance, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

So ordered.

JUSTICE SCALIA, concurring.

This is a simple case and should be simply resolved. The jury that deliberated on petitioner's sentence had before it evidence that should have been excluded in light of *Ake* v. *Oklahoma*, 470 U. S. 68 (1985). The Virginia Supreme Court so concluded (in an opinion that is not before us) and, having so concluded, was obliged to determine whether there was reasonable doubt as to whether the constitutional error contributed to the jury's decision to impose the sentence of death. *Satterwhite* v. *Texas*, 486 U. S. 249, 256 (1988). Because it failed to perform that task, the habeas judgment at issue here cannot stand, and a remand is appropriate to allow the Fourth Circuit to review the case under the harmless-error standard appropriate to collateral review. *Brecht* v. *Abrahamson*, 507 U. S. ___, ___ (1993) (slip op., at 16–17).

When these proceedings were before the Virginia Supreme Court after our first remand, petitioner managed to transform the simple question arising from the admission of constitutionally impermissible evidence ("might the constitutional error have affected the decision of the capital sentencing jury?") into a question of seemingly greater moment ("can a death sentence based in part on an 'invalid aggravating circumstance' still stand?"). The Virginia Supreme Court answered the second question, the wrong question, perhaps because it assumed that that could easily be resolved by reference to *Zant* v. *Stephens*, 462 U. S. 862 (1983); and on federal habeas, the District Court and the Fourth Circuit understandably focused upon the consequences of the Virginia Supreme Court's position that the "future dangerousness" aggravating circumstance was rendered "invalid" by the *Ake* error. The Court correctly demon-

strates why *Zant* is not applicable here, but regrettably follows the Virginia Supreme Court and the courts below in failing to strip the "invalid aggravating circumstance" camouflage that petitioner has added to a straightforward inadmissible-evidence case.